(1) Supreme Court, U.S.
FILED

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No. 01-668

IN THE

Supreme Court of the United States

GERARD T. OUIMETTE,

Petitioner,

v.

STATE OF RHODE ISLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF RHODE ISLAND

PETITION FOR A WRIT OF CERTIORARI

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Date: April 15, 2002

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8 cpp

QUESTIONS PRESENTED FOR REVIEW

I. Whether a presumption of regularity applies to a plea given in 1958, where the record is silent concerning defendant's waiver of his constitutional rights, where the plea occurred eleven years before *Boykin* v. *Alabama* was decided, and where the Supreme Court of the state where the plea was given has acknowledged that at the time the plea was given, "defendants were rarely informed by the court or, for that matter, counsel, of the effect upon their constitutional rights of a plea of nolo contendere or guilty".

II. Whether it was a violation of due process to shift the burden of proof to the petitioner to prove the invalidity of the 1958 plea by a preponderance of the evidence.

III. Whether the court erred in finding that petitioner was represented by counsel, or received effective assistance of counsel in accordance with the Sixth Amendment, where petitioner never hired a lawyer, no lawyer was appointed to represent him, and he never spoke to any lawyer at any time during his 1958 plea hearings.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Rhode Island in this case.

OPINION BELOW

The Opinion of the Supreme Court of Rhode Island, dated December 14, 2001, is reported at 2001 WL 1636671 and is attached hereto as Appendix A (A. 1a).*

JURISDICTION

This case seeks review of a decision of the Supreme Court of Rhode Island entered on December 14, 2001. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

United States Constitution, Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense."

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* References designated herein as (A.) are to petitioner's Record Appendix.

United States Constitution, Amendment XIV

"Nor shall any State deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

On October 22, 1958, the petitioner was arraigned in the Superior Court of Rhode Island on a charge of armed robbery and pleaded not guilty. The petitioner returned to the Superior Court on December 12, 1958, and a plea of nolo contendere was entered to the armed robbery charge. On January 12, 1959, the Superior Court sentenced and committed the petitioner to six years imprisonment in the state prison.

On February 7, 1996, the United States District Court for the District of Rhode Island sentenced the petitioner to a term of life imprisonment without parole after determining that the petitioner's 1958 criminal conviction by the State of Rhode Island was a qualifying serious violent felony pursuant to 18 U.S.C. Section 3559 (c)(2)(F). On September 14, 1998, in response to this sentence enhancement, the petitioner applied to the Rhode Island Superior Court to vacate the nolo contendere plea entered in 1958 by filing an application for post conviction relief pursuant to R. I. G.L. 1956, Section 10-9.1-1 *et seq.*

On March 16, 1999, the Superior Court conducted an evidentiary hearing on the petitioner's motion. At the hearing, no stenographic transcript of the 1958 plea hearings was available. The petitioner testified that he never hired a lawyer to represent him and was never advised by the court that he had a right to have a lawyer represent him, or that any lawyer had been appointed to represent him (A. 29a, 30a, 31a, 32a, 33a).[1] In fact, he never spoke to a lawyer between

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[1] The plea was given prior to the Supreme Court's decision in *Gideon* v. *Wainwright*, 372 U.S. 355 (1963).

his arraignment and when he was sentenced (A. 30a, 31a, 33a, 42a, 59a). He was never asked any questions by the court and was not advised that by pleading guilty he was waiving certain constitutional rights, nor was he asked to waive any rights (A. 32a, 34a). The clerk entered the plea on his behalf and he never spoke (A. 31a, 34a, 57a-58a). The petitioner also testified that he was innocent of the robbery charge (A. 49a, 59a, 61a).

The State offered no evidence to rebut or challenge any of these facts (A. 62a, 63a, 64a). The Superior Court found that the State was unable to directly rebut or challenge the petitioner's evidence (A. 18a). Notwithstanding this, the court found that petitioner's evidence was not sufficient to overcome the "presumption of regularity" that attaches to final judgments, or to meet his evidentiary burden of proving that his plea was not entered willingly or knowingly. The court further found that petitioner had been represented by counsel at his 1958 plea. The court thus denied the petitioner's motion to vacate the 1958 plea.

The petitioner appealed the decision of the Superior Court to the Supreme Court of Rhode Island. On December 14, 2001, the Rhode Island Supreme Court affirmed, finding that in collateral proceedings attacking the validity of a conviction used for purposes of sentence enhancement, the "presumption of regularity" attaches to a final judgment of conviction notwithstanding the absence of a record, and that defendant had failed to prove that his 1958 conviction was not knowing and voluntary by a preponderance of the evidence. The court further found that petitioner was represented by counsel at his 1958 plea hearing, and that he had failed to demonstrate that his counsel was ineffective. *Ouimette* v. *State*, 2001 WL 163667 (R.I. 2001).

REASONS FOR GRANTING THE WRIT

Petitioner was sentenced to life imprisonment pursuant to the "three strikes" provision of 18 U.S.C. § 3559(c)(1)(A), a statute that he was never indicted under, that no jury has ever convicted him of violating, and that no trier of fact, judge or jury, has ever determined that he was guilty of violating beyond a reasonable doubt. One of the qualifying felonies, or "strikes", used to enhance petitioner's sentence was a 1958 plea that was given without petitioner's having the assistance of counsel, without his being advised that he was waiving certain constitutional rights by pleading guilty, and without his being asked to waive any such rights. This case presents the opportunity for this Court to correct this manifest injustice.

I. NO PRESUMPTION OF REGULARITY APPLIES TO A PLEA GIVEN IN 1958, WHERE THE RECORD IS SILENT CONCERNING DEFENDANT'S WAIVER OF HIS CONSTITUTIONAL RIGHTS, WHERE THE PLEA OCCURRED ELEVEN YEARS BEFORE *BOYKIN* v. *ALABAMA* WAS DECIDED, AND WHERE THE SUPREME COURT OF THE STATE WHERE THE PLEA WAS GIVEN HAS ACKNOWLEDGED THAT AT THAT TIME, "DEFENDANTS WERE RARELY INFORMED BY THE COURT OR, FOR THAT MATTER, COUNSEL, OF THE EFFECT UPON THEIR CONSTITUTIONAL RIGHTS OF A PLEA OF NOLO CONTENDERE OR GUILTY".

A. The Law.

"For a guilty plea to be valid, it must be affirmatively shown that it was both intelligently and voluntarily given, and made with a full understanding both

of what the plea connotes and of its possible consequences." *Boykin* v. *Alabama*, 395 U.S. 238, 242-44 (1969). "That is so because a guilty plea constitutes a waiver of three constitutional rights: the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination". *Parke* v. *Raley*, 506 U.S. 20, 29 (1992), citing *Boykin* v. *Alabama*, *supra*, at 243. "For this waiver to be valid under the Due Process Clause it must be 'an intentional relinquishment or abandonment of a known right or privilege'. Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969), quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). A plea is not voluntary and intelligent if the defendant either (1) does not "understand the nature of the constitutional protections that he is waiving" or (2) "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt". *Henderson* v. *Morgan*, 425 U.S. 637, 645 n.13 (1976). When a trial judge accepts a plea, a record must be created affirmatively showing that the plea was knowing and voluntary, and the waiver of rights resulting from a guilty plea cannot be presumed from a silent record. *Boykin* v. *Alabama*, *supra*, at 242-44.

B. Uncontroverted Evidence Establishing That The 1958 Plea Was Not Knowing And Voluntary.

No stenographic transcript of the 1958 plea hearing is available. At the evidentiary hearing in Superior Court on petitioner's motion to vacate the 1958 plea, petitioner testified that when the plea was entered he was eighteen years old and had the benefit of a limited, seventh or eighth grade education (A. 27a,

29a). He had no prior exposure to the Superior Court (A. 28a).[2] He never hired a lawyer to represent him and was never advised by the court that he had a right to have an attorney represent him, or that any lawyer had been appointed to represent him (A. 29a, 30a, 31a, 32a, 33a). He never spoke to any lawyer between his arraignment and when he was sentenced (A. 30a, 31a, 33a, 42a, 59a). He was never asked any questions by the court and was not advised that by pleading guilty he was waiving certain constitutional rights, nor was he asked to waive any rights (A. 32a, 34a). The clerk entered the plea on his behalf and he never spoke (A. 31a, 34a, 57a-58a). The petitioner also testified that he was, in fact, innocent of the robbery charge (A. 49a, 59a, 61a).

This evidence was uncontroverted. The State offered no evidence to rebut or challenge any of these facts, despite being invited to do so by the court on four separate occasions (A. 62a, 63a, 64a). Indeed, the court specifically found that the State was unable to directly rebut or challenge the petitioner's evidence (A. 18a).

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[2] The Superior Court's finding that defendant had prior experience with the criminal justice system prior to making the 1958 plea was erroneous. After petitioner argued this in his brief to the Supreme Court of Rhode Island, the State conducted its own investigation which revealed that petitioner did not in fact have prior experience with the criminal justice system such that he would have been aware of the implications of a nolo plea the time of his 1958 plea hearing, and so stated in its brief and at oral argument. The Rhode Island Supreme Court did not note this in its opinion, apparently believing this fact to be of no consequence to its decision. In any event, prior experience with the criminal justice system at a time when the procedures followed in accepting pleas are acknowledged to have been constitutionally deficient, [*see, Bishop* v. *Langlois*, 106 R.I. 56, 63, 256 A.2d 20 (1969)], it is submitted, lends no support to a finding that petitioner's plea at a later time was "knowing and intelligent" based on the petitioner's prior experience.

C. Improper Application Of The Presumption Of Regularity.

Despite the petitioner's uncontroverted evidence, the Superior Court, relying on this Court's decision in *Parke* v. *Raley*, 506 U.S. 20 (1992), found that the petitioner had not presented sufficient evidence to overcome the "presumption of regularity" that attaches to criminal convictions and final judgments and denied petitioner's motion to vacate the 1958 plea (A. 22a). In affirming that decision, the Supreme Court of Rhode Island stated, in pertinent part:

> Although, as Ouimette points out, Raley's plea was entered in 1986[3] years after *Boykin* colloquies became mandatory, we remain satisfied that, in collateral proceedings attacking the validity of a conviction used for the purposes of sentence enhancement, the presumption of regularity attaches to a final judgment of conviction, notwithstanding the absence of a record. . . . In the present case, without question, the presumption of regularity governs our consideration of the validity of Ouimette's 1958 plea . . . .

Ouimette v. *State*, 2001 WL 1636671 (R.I. 2001). In so holding, the court overextended this Court's decision in *Parke* v. *Raley* with a result that directly conflicts with prior decisions of this Court, specifically *Boykin* v. *Alabama, supra*; *Burgett* v. *Texas*, 389 U.S. 109 (1967); and *Carnley* v. *Cochran*, 369 U.S. 506 (1962).

The "presumption of regularity" does not apply to a plea that was given in 1958, eleven years before *Boykin* v. *Alabama* was decided, where the record is silent concerning waiver. Unlike the 1979 and 1981

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[3] The pleas in issue in *Parke* v. *Raley* were entered in 1979 and 1981, not 1986.

pleas in *Parke* v. *Raley*, here *Boykin* colloquies had not been "required for nearly a quarter century", and were not "well established" in 1958. *Parke* v. *Raley, supra*, at 30, 31. In fact, at the time the petitioner's plea was entered, his federal constitutional rights to trial by jury, to confront one's accusers, and his privilege against compulsory self-incrimination had not yet been recognized as applicable to the states. *See, Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Malloy* v. *Hogan*, 378 U.S. 1 (1964). It "defies logic", therefore, to presume that the petitioner was advised of such rights or to presume that he was asked to waive same and did so. *Cf. Parke* v. *Raley, supra*, at 31. On the contrary, it is reasonable to presume that he was not advised of rights he did not yet possess and thus did not waive same. *Burgett* v. *Texas, supra*, at 114-115; *cf. Parke* v. *Raley, supra*, at 31. As this Court stated in *Johnson* v. *Zerbst, supra*, 304 U.S. at 458, 464: "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

The Supreme Court of the State of Rhode Island, where the plea was given, has acknowledged that at the time petitioner's plea, "defendants were rarely informed by the court or, for that matter counsel, of the effect upon their constitutional rights of a plea of nolo contendere or guilty". *Bishop* v. *Langlois, supra*, 106 R.I. at 63.[4] Accordingly, there can be no

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[4] "It is a matter of common knowledge that until our decision in Cole was announced, defendants were rarely informed by the Court or, for that matter, counsel, of the effect upon their constitutional rights of the plea of nolo contendere or guilty. The records disclose that usually the only information that was given was as to the availability of pleas of nolo contendere as a means of obtaining either the defferal of sentence or some moderation thereof. In short, in our courts the plea of nolo contendere was part of a bargaining process to which defendants resorted to ob-

"presumption of regularity" in this case, and the court erred in relying on same to uphold the validity of petitioner's 1958 plea.

Furthermore, as there is a silent record, and no presumption of regularity applies, the plea is presumptively void. *Boykin* v. *Alabama, supra*, at 242-44. Coupled with the petitioner's uncontroverted evidence that he was never advised that by pleading guilty he was waiving certain constitutional rights and was never asked to waive any such rights, the fact that petitioner had no prior experience with the criminal justice system, and that petitioner was never afforded assistance of counsel during his 1958 plea hearing, as demonstrated hereinafter, his 1958 plea cannot stand and must be vacated.

II. IT WAS A VIOLATION OF DUE PROCESS TO SHIFT THE BURDEN OF PROOF TO THE PETITIONER TO PROVE THE INVALIDITY OF THE 1958 PLEA BY A PREPONDERANCE OF THE EVIDENCE.

The Rhode Island Supreme Court held that petitioner had the burden of proving that his plea was not entered willingly and knowingly, and had failed to overcome the presumption of validity of the plea by a preponderance of the evidence. *Ouimette* v. *State, supra*, 2001 WL 1636671 at 4. Petitioner submits that it was a violation of due process to shift the burden of proof to petitioner to prove the invalidity of the 1958 plea by a preponderance of the evidence.

In *Moore* v. *Michigan*, 335 U.S. 155 (1957), the defendant sought a new trial on the grounds that his plea of guilty to a charge of murder was constitutionally invalid because he did not have the assistance of

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tain leniency with respect to penalties, and generally no effort was made to inform them that the entry of such a plea could be construed to constitute a waiver of their constitutional rights." *Id.*

counsel at the time of his plea and sentence. The record clearly showed that the defendant had expressly declined an offer of counsel by the trial judge. The Supreme Court thus held that the burden was on the accused to show by a preponderance of the evidence that his waiver of counsel was not sufficiently understanding and intelligent to be effective. *Id.* at 161-162. In *Carnley* v. *Cochran, supra*, the Court held that no such burden can be imposed upon an accused unless the record reveals that the accused intelligently and understandingly acquiesced to the waiver. *Id.*, 369 U.S. at 516-517. In *Boykin* v. *Alabama, supra*, the Court held that the same standard must be applied in determining whether a guilty plea is voluntarily made. *Id.*, 395 U.S. at 242.

In the instant case, the record is silent concerning the petitioner's waiver of his constitutional rights. The court below, however, placed the burden of proof on the petitioner to overcome the presumption of regularity that attaches to pleas that have become final. As previously demonstrated herein, no presumption of regularity applies in the circumstances of this case. [See Argument I, *supra*]. And because no waiver of constitutional rights can be presumed from a silent record, it was a violation of due process to place the burden on the petitioner to prove the absence of a knowing and intelligent waiver by a preponderance of the evidence. *Carnley* v. *Cochran, supra*, at 516-517.

In addition, the petitioner testified that he was never advised of the constitutional protections that he was waiving by pleading nolo contendere, nor was he asked to waive any such rights. This evidence was uncontradicted. Thus, as the record is silent, and the uncontradicted evidence produced by petitioner established that the 1958 plea was not knowing and voluntary, it was obtained in violation of due process and is therefore void. *McCarthy* v. *U.S., supra*, 394 U.S. at 466 (1969).

Finally, the petitioner's 1958 conviction was an "element" of a separate offense, 18 U.S.C. § 3559 (c)(1)(A), under which he was sentenced to life imprisonment - a term well beyond the statutory maximum for the offense he was actually indicted for, tried and convicted in the United States District Court in 1996, *i.e.*, 18 U.S.C. § 894.

> [I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact-of whatever sort, including the fact of a prior conviction-the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.

Apprendi v. *New Jersey*, 530 U.S. at 501 (Thomas, J. concurring).[5] It was thus the government's burden in the federal court to prove beyond a reasonable doubt

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[5] If the recidivism exception of *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) is at all viable, and petitioner believes based on this Court's decision in *Apprendi* that it is not, it is only applicable where a defendant admits to the earlier convictions and does not challenge their accuracy, and there is certainty that the convictions were entered pursuant to proceeding with substantial procedural safeguards of their own to ensure that they were not obtained in violation of the defendant's constitutional rights. *Apprendi*, at 488. *See also, United States* v. *Tucker*, 404 U.S. 443, 449 (1972); *Burgett* v. *Texas, supra*, (convictions obtained in violation of a defendant's constitutional rights cannot be used against a person either to support guilt or enhance punishment for another offense). Such is not the case here. The 1958 conviction was not "admitted" by defendant and was not "entered pursuant to proceedings with substantial procedural safeguards of its own", and was obtained in violation of petitioner's constitutional rights. The recidivism exception, therefore, if it survives, does not apply in this case.

each and every "element" of that offense, including that the 1958 conviction was obtained by constitutional means. Accordingly, where petitioner was compelled to challenge his 1958 conviction in state court,[6] it was a violation of due process for the Rhode Island Supreme Court to rely on a presumption of regularity to shift the burden of proof to the petitioner to demonstrate the invalidity of the 1958 conviction by a preponderance of the evidence where the record was silent. *See, Parke* v. *Raley, supra,* at 37-39 (Blackmun, J. concurring); *Boykin* v. *Alabama, supra; Apprendi* v. *New Jersey, supra.*

III. THE COURT ERRED IN FINDING THAT PETITIONER WAS REPRESENTED BY COUNSEL, OR RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL, AT HIS 1958 PLEA IN ACCORDANCE WITH THE SIXTH AMENDMENT.

A. The Petitioner Was Not Represented By Counsel.

The petitioner was not represented by counsel at his 1958 plea hearing. The Rhode Island Supreme Court's finding that "during testimony petitioner admitted to having been represented by counsel during the plea hearing" is simply not true. [7] Instead, it

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[6] *Custis* v. *United States,* 511 U.S. 485 (1994); *Daniels* v. *United States,* 532 U.S. 374 (2001).

[7] Although footnote 5 of the court's opinion is confusing, it would appear that the court relied in part on a "presumption of regularity" in finding that petitioner was represented by counsel. Since the plea was given in 1958, five years before *Gideon* v. *Wainwright* was decided, no presumption that petitioner was afforded the right to counsel would apply. No such presumption is proper in any event. *See, Burgett* v. *Texas, supra,* at 114-115.

represents a tortured reading of petitioner's testimony. The petitioner never testified that he was represented by a lawyer. Rather, the petitioner testified that he never hired a lawyer, that the court never advised him that it had appointed a lawyer to represent him, and that he never spoke to any lawyer between his arraignment and when he was sentenced on the robbery charge (A. 13-16, 18-19, 32, 57). The petitioner acknowledged that there was a lawyer in the courtroom when he appeared in Superior Court on December 12, 1958, whom petitioner never met previously, never spoke to, and never saw again (A. 16, 19), and that there were "a couple of guys" standing next to him at his appearance on January 12, 1959 (A. 20). None of these individuals ever identified themselves to the petitioner or to the court as attorneys representing the petitioner, however. In fact, there was no evidence that anyone purported to actually "represent" the petitioner on either occasion of his appearances in Superior Court.

This evidence was uncontroverted. The State offered no evidence that the petitioner was represented by counsel or that he waived his right to counsel. The record is silent in this regard, and waiver cannot be presumed from a silent record. *See, Carnley* v. *Cochran, supra.* Moreover, at that time petitioner's federal right to counsel had not yet been recognized as applicable to the states. Thus it is reasonable to presume that the petitioner did not waive a right he did not yet possess. *See, Parke* v. *Raley, supra*, at 31.

In these circumstances, where the conviction at issue occurred before *Gideon* v. *Wainwright* was decided, and where the record does not show that petitioner was represented by, or that he waived his right to counsel, the petitioner's conviction is presumptively void. *Burgett* v. *Texas, supra.* The burden was on the State to prove the validity of the conviction,

and as the State offered no evidence to rebut the presumption of invalidity, the plea must be vacated.

B. The Petitioner Did Not Receive Effective Assistance Of Counsel As Required By The Sixth Amendment.

Even accepting the court's erroneous finding that petitioner was represented by counsel at the 1958 hearing, it is readily apparent that petitioner did not receive effective assistance of counsel as guaranteed by the Sixth Amendment. In view of the uncontroverted evidence that no attorney explained to the petitioner what "nolo contendere" meant or that petitioner was pleading guilty, never advised him what the criminal charge was that was brought against him or the facts of the case, never advised him of the elements of the crime of robbery, never advised him of the effect or consequences of his plea, never advised him that by pleading guilty he was waiving certain constitutional rights, and in fact, never spoke to the petitioner at all, it cannot seriously be contended that petitioner received effective assistance of counsel.[8]

The Sixth Amendment provides a defendant with the right to effective assistance of counsel at each critical stage of the proceedings against him, including a hearing where he pleads guilty. *Boyd* v. *Dutton*, 405 U.S. 1, 2 (1972); *White* v. *Maryland*, 373 U.S. 59, 60 (1963). The Sixth Amendment guarantees not merely the formality of appointment, but the effective "assistance" of counsel. *Strickland* v. *Washington*, 466 U.S. 668, 685-686 (1984); *McMann* v.

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[8] The court's statement that "Ouimette utterly failed to introduce any evidence that his counsel was ineffective, nor has he established that counsel's performance was so deficient as to amount to a denial of counsel", is ludicrous in the face of this testimony.

Richardson, 397 U.S. 759, 771 n.14 (1970). "That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." *Strickland* v. *Washington*, *supra*, at 685.

A defendant whose attorney's "assistance" is as woefully inadequate as here is no better off than one who has been denied counsel altogether. In the circumstances of this case, where the evidence demonstrates unequivocally that petitioner did not receive "effective" assistance of counsel, or any assistance of counsel for that matter, and where the record is silent and thus no factual basis for the plea is shown, prejudice must be presumed. *Strickland* v. *Washington*, *supra*, at 692. When these circumstances are considered with the petitioner's unchallenged testimony that he was innocent of the offense with which he was charged, prejudice was, in any event, clearly established. Finally, it cannot be said that a plea under these circumstances could be voluntary and intelligent, and thus, petitioner submits, prejudice is irrelevant. *United States* v. *Tucker*, 404 U.S. 443, 447 n.5 (1972).

CONCLUSION

Based on the aforementioned arguments and authorities, petitioner respectfully requests that this Court review this case by writ of certiorari.

Respectfully submitted,

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APPENDIX A

2001 WL 1636671, Ouimette v. State, (R.I. 2001)

Supreme Court of Rhode Island.

Gerard T. OUIMETTE
v.
STATE.
No. 2000-131-APPEAL.
Dec. 14, 2001.

Russell Weddell, John P. Cicilline / Vincent Oddo, for Plaintiff.

Lauren Sandler Zurier, Aaron Weisman, for Defendant.

Present: WILLIAMS, C.J., LEDERBERG, BOURCIER, PLANDERS, and GOLDBERG, JJ.

OPINION

GOLDBERG, Justice.

****1** This case came before the Supreme Court on November 6, 2001, on appeal by the applicant, Gerard T. Ouimette (Ouimette or applicant), from a Superior Court judgment, denying his application for post-conviction relief. The applicant is before the Court in response to a sentence enhancement of life imprisonment without parole, pursuant to 18 U.S.C. § 3559(c)(2)(F), handed down by a judge of the United States District Court of Rhode Island. The applicant sought to vacate the state court convictions on various grounds, all aimed at invalidating the sentence enhancement provisions provided by Federal Law.

Facts and Travel

In 1958, at the age of eighteen, Ouimette was charged with armed robbery, to which he entered a plea of *nolo contendere*, and was sentenced to six years at the Adult Correctional Institutions by a justice of the Superior Court. In 1976, Ouimette pled to amended charges of assault with a dangerous weapon and conspiracy to commit assault with a dangerous weapon. He again entered a *nolo contendere* plea and was sentenced to a three-year suspended sentence. In 1981, Ouimette petitioned for post-conviction relief and sought to withdraw his plea in the 1976 conviction, based upon the assertion that there was no factual basis for the plea. The Superior Court denied relief, and, although Ouimette appealed this judgment to the Supreme Court, his counsel subsequently withdrew the appeal after Ouimette was released from custody.[1]

In 1996, based upon these prior state court convictions, which qualified as serious violent felonies pursuant to 18 U.S.C. § 3559(c)(2)(F),[2] the United States District Court sentenced Ouimette to life imprisonment without the possibility of parole. The applicant thereupon turned to the Superior Court and sought, through post-conviction relief proceedings, to vacate these convictions. The trial justice denied each

[1] The court file reflects that on February 6, 1981, Ouimette was presented as a violator of the probation that was imposed in 1976, and ordered held without bail. He thereupon sought to vacate this plea, alleging that there was no factual basis for the conviction. This petition was denied. However, after a full evidentiary hearing, Ouimette was found not to be a violator of the conditions of his probation and was ordered released from custody.

[2] From the record it appears that the underlying conviction in Federal District Court was conspiracy to collect extensions of credit by extortion and actual collections of credit by extortion and aiding and abetting.

application, finding that Ouimette was represented by counsel for his plea to the crime of robbery in 1958 and that he understood the nature and consequences of his actions. He also found that Ouimette had an eighth-grade education, and that, before his plea in 1958, Ouimette had previous experience in Rhode Island's criminal courtrooms, having entered pleas in the Sixth Division of the Rhode Island District Court on two separate occasions.[3]

The trial justice further determined that, based upon the presumption of regularity that attaches to a sentencing procedure, Ouimette had not met the burden of proof necessary to overcome that presumption and that he failed to establish that his 1958 plea was not a knowing and voluntary waiver of his right to a jury trial.

The trial justice also determined that, based upon his unsuccessful and unappealed previous challenge to his 1976 conviction, Ouimette's 1998 claims were barred by the doctrine of *res judicata*. Accordingly, the trial justice declined to vacate either conviction.

The applicant raises three issues on appeal. First, arguing that the absence of counsel renders that plea presumptively void, Ouimette maintains that the Superior court erred in finding that he was represented by counsel at his 1958 plea. Second, arguing ineffective assistance of counsel, Ouimette challenges the finding that his 1958 plea was knowing, intelligent and voluntary and challenges the trial justice's reliance on the presumption of regularity inherent in a final judgment. Finally, Ouimette asserts that his 1976 plea and sentence should be vacated on the grounds that the plea was not made with an

[3] This experience included both arraignments and convictions in misdemeanor cases.

understanding of the nature of the charges and because no factual basis existed for the plea. We deny the appeal.

**2 The findings of a trial justice, on applications for post-conviction relief, will not be disturbed on appeal unless there is clear error or a showing that the hearing justice overlooked or misconceived material evidence. *Brennan v. Vose*, 764 A.2d 168, 174 (R.I.2001). However, questions of fact concerning whether a defendant's constitutional rights have been infringed, and mixed questions of law and fact with constitutional implications, are reviewed *de novo*. *Powers v. State*, 734 A.2d 508, 514 (R.I.1999); *Mastracchio v. Moran*, 698 A.2d 706, 710 (R.I.1997). Findings of historical fact, and inferences drawn from those facts, will still be accorded great deference by this Court, even when a *de novo* standard is applied to the issues of constitutional dimension. *Powers*, 734 A.2d at 514.

1958 Plea

In 1965, in the leading case of *Cole v. Langlois*, 99 R.I. 138, 206 A.2d 216 (1965), this Court held that before accepting a plea of guilty or *nolo contendere*, the Superior Court justice was obliged to determine whether a criminal defendant was aware of the nature of a plea and its effect on his or her fundamental rights, including the right to a jury trial. We declared that this requirement applied notwithstanding that an accused was represented by counsel. *Id.* at 142, 206 A.2d at 218. We held that the court should advise and admonish the defendant about the nature of the charges and that this Court will look for record evidence to ascertain whether a criminal defendant was made aware of the consequences of a plea and the rights that the defendant was giving up, including the right to a jury trial. *Id.* at 143-44, 206 A.2d at 219. Later, in *Hall v. Langlois*, 105 R.I. 642, 254 A.2d 282

(1969), we qualified our holding in *Cole* and declared that the failure to comply with the obligation to advise a defendant of the nature and consequences of a plea was not fatal when the record as a whole establishes that the trial justice "was relieved of the obligation of advising and admonishing [the defendant] because he had ascertained upon preliminary inquiry from petitioner that he was already fully aware and cognizant of the effect and significance of such a plea." *Id.* at 645, 254 A.2d at 284. Further, we reiterated that the burden of proof fell upon the party challenging the validity of a plea to establish, by a preponderance of the evidence, that he did not already understand the nature of the charges and the rights he was giving up, either through prior experience with the criminal courts of this state or by reason of having been so advised by counsel. *Id.* Finally, in *Bishop v. Langlois*, 106 R.I. 56, 63, 256 A.2d 20, 23 (1969), we acknowledged that before our holding in *Cole*, "defendants were [rarely] informed by the court or, for that matter, by counsel, of the effect upon their constitutional rights of the plea of *nolo contendere* or guilty." However, we also recognized that a plea in a criminal case was motivated by a desire for a moderation of sentence and that a tacit admission of guilt was given in exchange for a lenient sentence, often a suspension of sentence based on the defendant's promise of future good behavior. *Id.* at 63-64, 256 A.2d at 23-24. Significantly, we reiterated that "[i]n no manner did this practice strike at the integrity of the guilt-finding process." *Id.* at 63, 256 A.2d at 24. In light of this time-honored procedure, we refused to authorize those defendants who entered into these bargains to challenge the voluntariness of their pleas based upon a retroactive application of our holding in *Cole*. *Bishop*, 106 R.I. at 64, 256 A.2d at 24. Thus, we declined to apply *Cole* retrospectively. *Id.* We noted that in *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274, 279 (1969), decided

one month prior to our holding in *Bishop*, the United States Supreme Court held that it was impermissible to presume a waiver of constitutional rights by a criminal defendant if the record was silent in regard to the voluntariness of the plea. Record proof of an intelligent and understanding waiver of a defendant's rights was required in order to protect the constitutional guarantees against compulsory self-incrimination, the right to a jury trial and the right to confront one's accusers. *Id.* Subsequently, in *Flint v. Sharkey*, 107 R.I. 530, 534, 268 A.2d 714, 717 (1970), this Court held that *Boykin's* requirements were prospective and did not apply to pre-*Boykin* plea proceedings. However, a plea entered subsequent to *Bishop* or *Boykin* "will be vacated unless the record shows that the court has conducted an on-the-record examination of the defendant before accepting [the] plea [in order] to determine if the plea is being made voluntarily with an understanding of the nature of the charge and the consequences of the plea." *Flint*, 107 R.I. at 537, 268 A.2d at 719.

****3** Nevertheless, with respect to pleas entered before *Boykin*, a defendant who is challenging the voluntariness of a plea is not without a remedy if constitutional deficiencies exist in his conviction. *Flint*, 107 R.I. at 535, 268 A.2d at 718. The substantive rights protected by the formal requirements of *Boykin* still obtain and, although a formal record is not required, these pleas must have been made by a defendant with full knowledge of the nature of the charges and the constitutional rights that were implicated. *Flint*, 107 R.I. at 535-36, 268 A.2d at 718.

In 1992, the Supreme Court revisited these issues in *Parke v. Raley*, 506 U.S. 20, 29-30, 113 S.Ct. 517, 523, 121 L.Ed.2d 391, 403-04 (1992), and addressed the balance between the presumption of *regularity* that attaches to final judgments against the

presumption of *invalidity* that arises from a record that does not clearly indicate that a criminal defendant knowingly and voluntarily waived his constitutional rights. In examining a conviction that was allegedly based upon an uninformed guilty plea, the Court distinguished *Boykin* challenges that are made on direct review of a conviction and disputes that arise in collateral proceedings. *Id.* In *Parke*, the defendant undertook a collateral challenge to prior convictions that were final judgments. *Id.* The Court refused to apply the presumption of invalidity simply because there was no record, holding that "it defies logic to presume from the mere unavailability of a transcript [in the absence of governmental misconduct] that the defendant was not advised of his rights." *Id.* at 30, 113 S.Ct. at 524, 121 L.Ed.2d at 404. Although, as Ouimette points out, Raley's plea was entered in 1986, years after *Boykin* colloquies become mandatory, we remain satisfied that, in collateral proceedings attacking the validity of a conviction used for purposes of sentence enhancement, the presumption of regularity attaches to a final judgment of conviction, notwithstanding the absence of a record. As the Supreme Court noted, to hold otherwise would "improperly ignore another presumption deeply rooted in our jurisprudence: the 'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights." *Parke*, 506 U.S. at 29, 113 S.Ct. at 523, 121 L.Ed.2d at 404. In the present case, without question, the presumption of regularity governs our consideration of the validity of Ouimette's 1958 plea to the crime of armed robbery in what is a collateral attack on a previous conviction that long has been a final judgment.

Additionally, reallocating the burden of proof from the applicant to the state, merely because of a

scant record in a forty-three-year old conviction, would be exceedingly unjust.

> "If raising a *Boykin* claim and pointing to a missing record suffices to place the entire burden of proof on the government, the prosecution will not infrequently be forced to expend considerable effort and expense attempting to reconstruct records from farflung States where procedures are unfamiliar and memories unreliable." *Parke*, 506 U.S. at 31, 113 S.Ct. at 524-25, 121 L.Ed.2d at 405.

**4 Therefore, we are satisfied that the trial justice was correct when he determined that the presumption of regularity attached to these final judgments. Further, we note that the hearing justice also concluded that Ouimette's recollection of events was "not credible, not reliable, and not sufficient" to overcome the presumption of regularity that attaches to final judgments or to meet his evidentiary burden of proving that his plea was not entered willingly and knowingly. We conclude that the trial justice did not err in making these findings. The applicant simply has failed to overcome the presumption of validity of this criminal conviction by a preponderance of the evidence.

1976 Plea

Ouimette also argues that the 1976 conviction, based upon a plea of *nolo contendere* to amended charges of assault with a dangerous weapon, should be vacated because the plea was not voluntary and because he did not understand the nature of the charges and the rights he was giving up.[4] As noted,

[4] This plea was entered nearly two decades after the 1958 robbery conviction, at a time when this applicant was an experienced veteran of the criminal justice systems. As the First

Ouimette previously litigated, by way of post-conviction relief, the validity of his 1976 conviction after the state alleged that he violated the terms and conditions of his probation. Although the issue of voluntariness was not raised in 1981, the question of whether there was a factual basis for the conviction was fully considered and rejected by the trial court. As a result, because Ouimette could have raised this challenge in the previous proceeding, the issue of voluntariness is barred by the doctrine of *res judicata* and amounts to a waiver of this claim. *Meguel v. State*, 774 A.2d 19, 21 (R.I.2001); *Johnson v. Mullen*, 120 R.I. 701, 705, 390 A.2d 909, 911 (1978). *Res judicata* bars the litigation of any issue that could have been litigated in a prior proceeding, even if the particular issue was not raised. *Carillo v. Moran*, 463 A.2d 178, 183 (R.I.1983). In order for *res judicata* to apply in a subsequent proceeding, four elements must be met: (1) identity of the parties; (2) identity of the issues; (3) identity of the claims for relief; and (4) finality of the judgment. *Estate of Bassett v. Stone*, 458 A.2d 1078, 1080 (R.I.1983). We are satisfied that all four elements are present in this case. Obviously, the parties are the same, as are the issues and the claim for relief; Ouimette challenged the validity of his 1976 plea and sought to have the conviction set aside. Although the question of whether it was a knowing and voluntary plea was not raised during the prior proceeding, it could have been litigated. Thus, *res judicata* bars the litigation of this issue. Finally, the judgment denying his petition to vacate the 1976 plea became a final judgment when Ouimette withdrew his appeal to this Court.

Circuit recognized in the applicant's appeal of the federal charges, "[g]iven Ouimette's lengthy history of violent criminal activity, the 'three strikes' sentence cannot be considered grossly disproportionate." *United States v. Ouimette*, 137 F.3d 24, 40 n.19 (1st Cir. 1998).

Therefore, all the elements necessary for *res judicata* are satisfied in this case. We conclude that the trial justice did not err when he decided that Ouimette's challenge to the 1976 plea was barred by *res judicata*.

Ineffective Assistance of Counsel

**5 The applicant also alleged that he was denied the effective assistance of counsel in 1958, and again during the original post-conviction relief proceeding, because his lawyer failed to raise the issue of voluntariness and failed to prosecute an appeal to this Court.

With respect to the 1958 robbery conviction, Ouimette utterly failed to introduce any evidence that his counsel was ineffective, nor has he established that counsel's performance was so deficient as to amount to a denial of counsel.[5]

We long have recognized that a strong presumption exists that an attorney's performance falls within the range of reasonable professional assistance and sound strategy, creating a heavy burden for a party to establish constitutionally ineffective representation. *Hughes v. State*, 656 A.2d 971, 972 (R.I.1995). Based upon the standard established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court has stated that in order to establish a claim for ineffective assistance of counsel, a defendant must show: (1) that the counsel's performance was so deficient and the errors so serious that they violate a defendant's Sixth

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[5] Ouimette's testimony that there were "a couple of guys" standing with him during the sentencing hearing is insufficient to overcome the presumption of regularity that attaches to a final judgment. In fact, during testimony, Ouimette admitted to having been represented by counsel during the plea hearing.

Amendment guaranty of counsel; and (2) that this deficient performance prejudiced his or her defense and deprived the defendant of his or her right to a fair trial. *Powers v. State*, 734 A.2d 508, 522 (R.I.1999).

Rather than arguing to the trial court that his counsel's performance was deficient, amounting to ineffective representation, Ouimette elected to file a post-decision affidavit by attorney John F. Cicilline (Cicilline) in which he testified that his reason for withdrawing applicant's 1981 appeal was because "the issues had become moot." This affidavit is not sufficient support for a claim of ineffective assistance of counsel. It amounts to inadmissible hearsay and is not a part of the record in this case. *See State v. Turley*, 113 R.I. 104, 109, 318 A.2d 455, 458 (1974) (unfounded claims or unsupported charges of ineffectiveness of counsel are not legally competent evidence to establish a denial of effective assistance of counsel); *see also* Sup.Ct. R.App. P. 10(a).[6] Therefore, the evidence required to support a claim of ineffective assistance of counsel is lacking in this case. Additionally, Cicilline's affidavit, if admitted, fails to rebut the presumption that an attorney's actions fall within the reasonable range of professional conduct. The fact that Cicilline did not raise an issue, or pursue and appeal, does not amount to ineffective assistance of counsel. *See State v. D'Alo*, 477 A.2d 89, 92 (R.I.1984) (decisions made and actions taken by counsel as trial strategy must have resulted from neglect or ignorance to constitute ineffective

[6] Article I, Rule 10(a) of the Supreme Court Rules of Appellate Procedure provides:

> "The record on appeal -- (a) *Composition of the Record on Appeal.* The original papers and exhibits filed in the trial court, the transcript of proceedings or electronic sound recordings thereof, if any, and a certified copy of the docket entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases."

assistance of counsel). The affidavit is silent in regard to why an available claim for relief was not asserted and does not establish, in any way, that Cicilline's conduct justifies the consideration of these claims twenty-five years after the fact. Additionally, the applicant testified that he was satisfied with the performance of this well-respected seasoned trial lawyer and had engaged Cicilline to pursue this case in the Superior Court.

Conclusion

****6** For the aforementioned reasons, the applicant's appeal is denied and dismissed. The judgment denying Ouimette's application for post-conviction relief is affirmed. The papers of this case are remanded to the Superior Court.

APPENDIX B

FILED: JANUARY 18, 2000

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

PROVIDENCE, SC SUPERIOR COURT

STATE OF RHODE ISLAND

v. C.A. No. PM/98-4656
and P2/75-

1436

GERARD OUIMETTE

DECISION

PFEIFFER, J., On February 7, 1996, the United States District Court for the District of Rhode Island sentenced the defendant to a term of life imprisonment without parole after determining *inter alia* that the defendant's 1958 and 1976 criminal convictions by the State of Rhode Island were qualifying serious violent felonies pursuant to 18 U.S.C.S. § 3559(c)(2)(F). The United States District Court for the District of Rhode Island concluded that after reviewing the defendant's "ugly history of criminal behavior" an enhanced sentence to the federal conviction was warranted. On September 14, 1998, in response to this sentence enhancement, the defendant collaterally attacked the nolo contendere pleas that he entered in the 1958 and 1976 dispositions by petitioning this Court for post conviction relief pursuant to G.L. 1956 § 10-9.1-1 et seq.

FACTS AND TRAVEL

On October 22, 1958, Gerard T. Ouimette (defendant) was arraigned in the Superior Court, Providence County, on a charge of armed robbery and pleaded not guilty. The defendant returned to the Superior Court on December 12, 1958, and entered a plea of nolo contendere to the armed robbery charge. On January 12, 1959, the Superior Court sentenced and committed the defendant to six years at the Adult, Correctional Institute. The defendant did not appeal this criminal conviction. Additionally, on September 15, 1976, the defendant entered a plea of nolo contendere in the Superior Court to charges of assault with a dangerous weapon and conspiracy to commit assault with a dangerous weapon. The Superior Court sentenced the defendant to three years, suspended, and four years of probation. On February 11, 1981, the defendant, via counsel, filed a motion for post conviction relief to withdraw the nolo contendere pleas entered on September 15, 1976, arguing that there was no factual basis for the plea. After a hearing on February 24 and 25, 1981, the Superior Court determined that there was a factual basis for the plea and denied the petition for post conviction relief. The defendant did not appeal this determination. The defendant now petitions this Court to vacate the 1958 nolo contendere plea because the defendant did not knowingly, intelligently, and voluntarily make the plea, and to vacate the 1976 nolo contendere plea because the Court did not elicit a factual basis for the plea and the defendant "should not be held liable to the decision by his counsel not to fully litigate a viable issue."

This Court, on March 16, 1999, conducted an evidentiary hearing in accordance with Harris v. Langlois, 100 R.I. 196, 212 A.2d 715 (R.I. 1965), wherein the State submitted sufficient evidence for this Court to find that the above pleas and convictions

were entered by the Superior Court. However, neither the State nor the defendant was able to provide this Court with stenographic transcripts and notes of the 1958-1959 hearings as they were probably destroyed by the State pursuant to G.L. 1956 § 8-5-4, and the defendant has not maintained a personal copy.[1]

In support of the petition for post conviction relief from the 1958 plea of nolo contendere the defendant presents his affidavit, dated August 5, 1998, which states, in pertinent part, that:

> 3) . . . during the pendency of my indictment I had no meetings with the lawyer who represented me and in fact only saw him in the courtroom when the plea was entered . . .
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> 4) . . . I did not know the elements of the crime of robbery, nor were they ever explained to me by the court or counsel . . .
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> 5) . . . neither counsel, nor anyone else ever explained possible defenses . . .
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> 6) . . . neither counsel nor the court ever explained the effect or consequences of a plea of nolo contendere. . . .

The defendant also presents oral testimony describing his present recollection of the 1958-1959 hearings, his plea of nolo contendere, and the sentence imposed by the Court.

At the time the defendant entered his plea of nolo contendere on December 12, 1958, he was eighteen

[1] In 1971, our Supreme Court determined that the records of proceedings wherein the Court accepts pleas in criminal cases shall be "preserved without limit" by the State. Hall v. Langlois, 108 R.I. 454, 461, 276 A.2d 768, 772 (1971).

years of age and had formal education up to the eighth grade. The defendant had experience in the juvenile court system, and was arraigned and convicted on two separate occasions in the District Court of Rhode Island, Sixth Division. On August 1, 1958, the defendant pleaded to a charge of simple assault and received a thirty day sentence. On August 30, 1958, the defendant pleaded to a charge of misdemeanor larceny and received another day sentence. From the defendant's present testimony, the Court finds that, at the time of these proceedings in August 1958, the defendant fully understood that the consequences of pleading to charges brought against him by the State in the District Court was often a fine and a sentence. Additionally, the defendant testified that he did not remember if he was represented by counsel at these proceedings, although he did state that it was "possible" he was represented by counsel. The Court finds that the defendant's recollection of these two proceedings is poor and his memory understandingly lacked detail as the events occurred approximately forty years ago.

However, upon oral examination the defendant was able to provide a detailed account of the occurrences surrounding the 1958 plea of nolo contendere. The defendant testified that although he was represented by counsel on December 12, 1958 and on January 12, 1959, he assertively remembers that: 1) he did not have any discussions with his counsel inside or outside the courtroom at any time between October 122, 1958 and January 12, 1959, 2) he was not informed of, and he did not know, the criminal charge brought against him, 3) he was not instructed either by counsel or by the Court of the meaning and consequences of a plea of nolo contendere, 4) he did not understand that he was waiving certain constitutional rights by making such a plea, and 5) he did not understand that he could receive a sentence of incarceration by allowing a plea

of nolo contendere to be entered by the Court. Moreover, the defendant was able to recall conversations with codefendant, Robert Kandos, who purportedly stated, as the defendant recalled, that "I will take care of things. Don't worry about it. I'm going to get a lawyer and I'm going to get you out of trouble. . . . I got you a lawyer." The defendant testified that at the time of the hearings he was unsure whether an attorney represented him; however, he also testified that an attorney did represent him at these hearings although he did not, and does not, know his identity. This Court notes, without making a factual finding, that the defendant also testified that the defendant's present counsel, John F. Cicilline, "has been my lawyer since 1956." From the evidence presented, this Court finds that the defendant was represented by counsel at the December 12, 1958 and January 12, 1959 hearings.

To support the petition for post conviction relief from the 1976 plea of nolo contendere, the defendant submits a copy of the stenographic transcript of the September 15, 1976 hearing before the Superior Court wherein the defendant submitted affidavits and made his plea of nolo contendere. In opposition, the State submits the stenographic record of the decision of the Superior Court issued after a hearing on February 24 and 25, 1981, wherein the Court determined that "there was a factual basis for the charge against [the defendant] as amended" and, therefore, the Court denied the petition for post conviction relief.

POST CONVICTION RELIEF FROM THE 1958 PLEA OF NOLO CONTENDERE

It has long been the rule of this jurisdiction that a plea of nolo contenders is, for all practical purposes, equivalent to a plea of guilty. State v. Feng, 421 A.2d 1258, 1266 (R.I. 1994); Cole v. Langlois, 99 R.I. 138, 140-141, 206 A.2d 216, 217 (1965). The post

conviction relief proceedings conducted. under G.L. § 10-9.1.1 et seq. are civil in nature. State v. Tassone, 417 A.2d 323 (R.I. 1980). In this case, the defendant maintains the burden to establish by a preponderance of the evidence that he did not willingly and knowingly enter his 1958 plea of nolo contendere. Palmigiano v. Mullen, 119 R.I. 363, 375, 377 A.2d 242, 248 (1977); Flint v. Sharkey, 107 R.I. 530, 537, 268 A.2d 714, 718 (1970).

The defendant did not directly appeal the conviction based upon his 1958 plea of nolo contendere and it became final many years ago. The defendant petitions this Court to revisit the question of whether the conviction is valid approximately forty years after the plea of nolo contendere was entered solely because he has received an enhanced sentence in a subsequent conviction in the United States District Court for the District of Rhode Island based, in part, upon this 1958 conviction.

The defendant has submitted an affidavit and provided oral testimony to this Court that for the lack of a stenographic record and the unavailability of other witnesses to the proceedings caused by a forty year delay, the State is unable to directly rebut or challenge. However, the State is not without recourse to present substantive opposition to this petition. The United States Supreme Court has recognized that a "presumption of regularity" attaches to final judgments in criminal proceedings where the conviction is based upon the defendant's guilty plea despite the question of whether the defendant's constitutional rights were violated. See Parke v. Raley, 506 U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992). Moreover, our Supreme Court has recognized in the context of sentencing procedure that, absent sufficient proof to the contrary, there is a "presumption of regularity" that the "judge proceeded in accordance with the law." State v. Crescenzo, 114 R.I. 242, 262, 332 A.2d 421, 432 (1975); Powers v.

Langlois, 90 R.I. 45, 153 A.2d 535 (1959); See also Signore v. Zoning Bd. of Review of Town of Barrington, 98 R.I. 26, 199 A.2d 601 (1964) ("[S]worn officers of the law are entitled to the presumption that their official acts have been properly performed, until contrary is proved." (citations omitted)). This presumption is supportive of the important policy of finality of judgments in promoting the integrity and efficiency of our judicial system. The United States Supreme Court also has recognized that:

> [o]ne of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. 'Without finality, the criminal law is deprived of much of its deterrent effect.' (citation omitted). And when a habeas petitioner succeeds in obtaining a new trial, the "erosion of memory' and 'dispersion of witnesses' that occur with the passage of time,' (citation omitted), prejudice the government and diminish the chances of a reliable criminal adjudication.
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> . . .
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> If [c]ollateral review of a conviction extends the ordeal of trial for both society and the accused,' (citation omitted), the ordeal worsens during subsequent collateral proceedings. Perpetual disrespect for the finality of convictions disparages the entire criminal justice system.

McCleskey v. Zant, 499 U.S. 467, 491, 111 S.Ct 1454, 1468, 113 L.Ed.2d 517, 542 (1991). After

thorough review of the evidence presented, the defendant presents neither sufficient evidence nor persuasive argument that this Court should not recognize the "presumption of regularity" that attached to the 1958 plea of nolo contendere made by the defendant.

Other Courts also have recently addressed the issue of evaluating a petition for post conviction relief from a guilty plea where the stenographic record has been properly destroyed and witnesses are unavailable because the plea was made many years ago. For example, in Commonwealth v. Lopez, 690 N.E.2d 809, 812 (Mass. 1998), the Supreme Judicial Court for the Commonwealth of Massachusetts recognized that:

> when the defendant leaves his guilty pleas unchallenged for a lengthy period of time, so that the contemporaneous record of the plea is lost (by proper destruction of stenographic notes . . .), and the means of reconstruction are made impractical or impossible due to the death or retirement of judges, land court reporters, the unavailability of witnesses, the inherent weaknesses and failures of recollection, and other factors commonly associated with the passage of time. . . . the absence of a record, and the inability effectively to reconstruct it may be directly attributed to the defendant's delay and may be said to be the defendant's fault. . . . In such a case, the defendant's attack on his pleas . . . necessarily proceeds on a basis extrinsic to the unavailable contemporaneous record. In assessing such a challenge, a judge is not required to accept the defendant's self-serving affidavit, alleging constitutional defects in conclusory

> terms, as sufficient to satisfy the defendant's burden. . . .

See also Commonwealth v. Grant, 689 N.E.2d 1336 (Mass 1998); United States v.Hardy, 829 F.Supp. 478 (D.Mass. 1993). Moreover, the Supreme Court of South Dakota has recognized that "[a]s the chronological and procedural challenge to a conviction becomes more removed from the conviction itself, the court must exercise decreasing scrutiny, in the review of constitutional issues." State v. Moeller, 511 N.W.2d 803, 808 (S.D. 1994). This is because "[c]hallenges to distant convictions strike at finality. . . ." Id.

This Court, in evaluating a petition for post conviction relief and in assessing the defendant's credibility in alleging that he did not know the effect and consequences of a plea to the criminal charges, may treat evidence of the "defendant's prior experience with the criminal justice system as relevant to the question whether he knowingly waived constitutional rights." Parke v. Raley, 506 U.S. at 37, 113 S.Ct. at 527, 121 L.Ed.2d at 408. The defendant had experience with the criminal justice system on at least two separate occasions prior to making the 1958 plea of nolo contendere. From these prior dispositions in the District Court of Rhode Island, the defendant understood that by making a plea of guilty or nolo contendere he could, and did, receive a fine and a sentence. This Court finds that the defendant's understanding about the consequences and effects of making a plea to a criminal charge brought against him in the District Court carried forward to approximately four months later when the defendant made the plea of nolo contendere in the Superior Court.

After thorough review of the evidence presented, this Court finds that the defendant did not present sufficient credible or reliable evidence that his 1958 plea was not made willingly and knowingly. This

Court finds that the defendant's recollection, as illustrated in the affidavit and by oral testimony is not credible, not reliable, and not sufficient either to overcome the "presumption of regularity" that attaches to criminal convictions and final judgments or to meet the defendant's evidentiary burden before this Court that he did not enter his plea willingly and knowingly.

Additionally, although the defendant has not, and does not, present a claim for ineffective assistance of counsel in either case action, this Court notes that there is a "strong presumption in favor of competent representation" and that prejudice to the defendant will exist "if there is a reasonable probability that, absent counsel's deficient performance, the result of the proceeding would have been different.". State v. Figueroa, 639 A.2d 495, 500 (R.I. 1994) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "When evaluating a claim for ineffective assistance of counsel in a plea situation, the defendant must demonstrate a reasonable probability that but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial." Id. (citing Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 2 10 (1985); United States v. Del Rosario, 902 F.2d 55, 57 (D.C.Cir. 1990)). The defendant does not present sufficient evidence for this Court to find that, but for the alleged errors on behalf of his counsel and the Court, the defendant would not have made the 1958 plea of nolo contendere and would have decided to proceed to a jury trial of the charges. Therefore, this Court denies the defendant's petition for post conviction relief to vacate his 1958 plea of nolo contendere.

THE 1976 PLEA OF NOLO CONTENDERE

"The doctrine of res judicata operates as an absolute bar to relitigation of the same issues between the same parties when a final judgment has been rendered." Carillo v. Moran, 463 A.2d 178, 182 (R.I. 1983). "In sum, for res judicata to bar a cause of action, there must be (1) identity of parties, (2) identity of issues, (3) identity of claims for relief, and (4) finality of judgment." Bassett's Estate v. Stone, 458 A.2d 1078 (R.I. 1983). The Court may apply the doctrine of res judicata to post conviction relief proceedings. Thornley v. Mullen, 115 R.I. 505, 349 A.2d 158 (R.I. 1975). Additionally, our Supreme Court has recognized that "[a] defendant generally may not divorce himself from responsibility for his counsel's failure to raise or pursue issues at trial or on direct appeal absent a claim for ineffective assistance of counsel." Carillo v. Moran, 463 A.2d at 183 (citations omitted).

The issue of whether there was a sufficient factual basis to support the 1976 plea of nolo contendere has been previously addressed in the 1981 post conviction relief proceedings wherein the Superior Court issued an extensive and thoroughly considered decision on the matter. After reviewing the record presented, this Court concludes that the defendant's petition for post conviction relief from the 1976 plea of nolo contendere for lack of a factual basis is barred by the doctrine of res judicata. Moreover, the defendant's position that he "should not be held liable to the decision by his counsel not to fully litigate a viable issue" is not probative in that there has not been, and is not, a claim for ineffective assistance of counsel in this case. This Court notes that the defendant's present counsel, John F. Cicilline, also represented the defendant at the February 24 and 25, 1981 hearing before the Superior Court wherein the Court denied the defendant's petition for post

conviction relief. Therefore, this Court denies the defendant's petition for post conviction relief from his 1976 plea of nolo contendere.

Counsel shall prepare and submit the appropriate orders for entry of judgment in accordance herewith, within ten days.

APPENDIX C

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

STATE OF RHODE ISLAND

VS. 75-1436

GERARD T. OUIMETTE

HEARD BEFORE
THE HONORABLE JUSTICE PFEIFFER
MARCH 16, 1999

APPEARANCES:

STEPHEN REGINE, ESQ.
SPECIAL ASSISTANT ATTORNEY GENERAL
FOR THE STATE

JOHN F. CICILLINE, ESQ.
FOR THE DEFENDANT

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. . . we could, please.

[2] MR. CICILLINE: If I could identify for the record that PM 98-4646 involves a 1958 plea on indictment 29046. Application for post-conviction relief was filed in that case September 14, 1998. I'm sorry. In 75-1436 there was a motion to vacate filed on February 18, 1991. In November of 1998 the defendant moved to amend the motion to vacate to a petition for post-conviction relief. So there are two post-conviction reliefs on the seventy-five application. There is a transcript of September 15, 1976. It is the defendant's position the transcript supplements the record for the purpose of that post-conviction relief application. On the 1958 case testimony is necessary.

THE COURT: Okay. Then turning to the PM 98-4646 case why don't we proceed with that. Can we have the transcript marked as it relates to the other case once we have concluded this testimony?

MR. CICILLINE: The transcript is appended to the application.

THE COURT: The State has no objection to the authenticity of the being considered with respect to that second application as recited by Mr. Cicilline?

MR. FOWLER: I haven't seen it, Your Honor, but I assume it's the same transcript that I have.

MR. CICILLINE: It's the hearing before Judge Needham.

[3] MR. FOWLER: The hearing before Justice Needham on September 15, 1976, I have no objection to that.

THE COURT: Okay. Thank you. Mr. Cicilline, you wish to have testimony presented by the defendant.

MR. CICILLINE: Yes, Your Honor.

GERARD T. OUIMETTE, after having been duly sworn testified as follows:

DIRECT EXAMINATION BY MR. CICILLINE:

Q Mr. Ouimette, where were you born?
A Providence, Rhode Island.
Q And in what year?
A 1940.
Q And who did you live with during your young life?
A Please.
Q Who was your family during your young life?
A Providence.
Q What was your family? What constituted your family?
A My mother, father, sisters and brothers.
Q And did your father live with you throughout your life? When did your father die?
A 1948. I believe I was eight years old.
Q Okay. And do you recall what your father's employment was? **[4]**
A He drove somebody.
Q Truck driver?
A No, I think cars. He drove for some politician and then he drove cabs.
Q During 1940 on, 1958, October of 1958, what was your education?
A I didn't like school so it couldn't have been much. Seventh, eighth grade, whatever. I didn't get along in school well.
Q So you had no education beyond the seventh or eighth grade?
A Not really.
Q Okay. Between 1940 and October of 1958 were you employed?
A Yeah. I worked at Loutitt laundry for a while. That was between '57 and '58.

Q Between 1940 and October of 1958 had you been to the juvenile court?
A Yeah, a few times.
Q And had you ever been charged with a crime of robbery?
A No.
Q No?
A Never.
Q Prior to October of 1958 did you take any classes in the juvenile justice system, formal educational class?
A Prior to 1958?
Q Yes. **[5]**
A No.
Q Had you ever been to the Superior Court before October of 1958?
A No.
Q Sometime in 1958 you were arrested, is that right?
A Right.
Q Do you remember the date?
A Not really.
Q It was prior to October 22nd when you were arraigned in Superior Court, is that right?
A Right, yeah.
Q Were you brought to the police station?
A Right.
Q And who was there when you got there?
A You mean the police?
Q No. In terms of other arrestees?
A Well, I saw two bags on the table and when I got into the cell block Bobby Kandos was there.
Q Was there anyone else arrested at that time?
A Not in my case. But there were two other guys that are recognized, Bobby Capuano and Bobby Charpeneau.
Q Were they known to be associates of Kandos?
A Yeah. **[6]**

Q Now, the next day you were charged with this offense, is that right?
A Right.
Q Did you have a lawyer at the time you were charged in District Court?
A No.
Q On October 22nd you appeared in Superior Court, October 22, 1958, is that right?
A Right.
Q And who was your co-defendant in that case?
A Bobby Kandos.
Q How old were you on the date that you were charged with this offense?
A I had to be eighteen.
Q And do you know how old Kandos was?
A He was a little older than me.
Q When you appeared in the Superior Court on that arraignment date did you have a lawyer?
A No.
Q Had you made any efforts to hire a lawyer before that?
A No.
Q Do you recall whether or not a plea of any kind was entered on that day? This is your first appearance in Superior Court?
A No, I think--oh, no. the judge says I'm going to enter **[7]** a plea of not guilty.
Q Okay. And where did you go from there?
A I went to the can.
Q All right. Did you see Robert Kandos while you were in prison?
A Yes.
Q Did you have any discussions with him about the case?
A Yeah.
Q What were those discussions?
A Well, I said to him Bobby, what's going on over here? What am I doing in this case. What am I doing in trouble with you? And he started to avoid

me. He said, well, listen I can't explain nothing now but down the road I will take care of things. Don't worry about it. I'm going to get a lawyer and I'm going go get you out of trouble so, okay. He lives on one side. I live on the other side of the block. And in 1958 you didn't get out much so I didn't really get much of a chance to talk to him.

Q All right. While you were in prison after October 22, 1958, did you ever see a lawyer while you were there?
A No.
Q Were you given a copy of the indictment?
A No.
Q Were you shown any discovery of any kind? **[8]**
A No.
Q Did you in fact know the specifics of what you had been charged with?
A No.
Q Did the name Betty Kirzner mean anything to you?
A No.
Q Did you know what the legal definition of robbery was at that time, the elements that constitute it?
A No.
Q On December 12th of 1958 you were returned to the courthouse?
A Right.
Q Is that right?
A Yeah.
Q Had you seen a lawyer up to that point?
A No.
Q It was in this very courthouse?
A Yeah.
Q And you were down in the cell block?
A It might have been in this courtroom.
Q Were you down in the cell block?
A Yes.
Q While you were down in the cell block did a lawyer come down and talk to you?

A No. **[9]**
Q Were you shown a copy of an indictment on that day?
A No.
Q Did you have a discussion about the facts of your case with anyone on that day?
A No.
Q Did anyone discuss with you what the crime of robbery was before you came into the courtroom?
A No.
Q Did there come a time you were brought up into the courtroom, is that right?
A Yeah.
Q And do you recall who the judge was?
A Joslin.
Q When you walked into the courtroom at that moment had you hired a lawyer?
A No.
Q All right. Was there a lawyer there?
A Yes.
Q What happened while you were in the courtroom?
A Now this is on the 12th of December?
Q Yes.
A The clerk said Your Honor this is nolo contendere and first of all your name Gerard Ouimette. This is nolo contendere. The judge said nolo contendere. Okay. We will put it off until the twelfth of next month and I **[10]** went back downstairs.
Q Did you know what the words nolo contendere meant on December 12, 1958?
A No.
Q Did you have any lawyer to explain to you what those terms meant?
A No.
Q While you were in court on that day, December 12, 1958, did your lawyer or the judge or the prosecutor say what the elements were for the crime of robbery?
A No.

Q Did anyone including the court, your lawyer or the prosecutor discuss possible defenses to the crime of robbery?
A No.
Q Were any facts involving the actual crime of robbery with which you were charged discussed on that day?
A No, not one.
Q Did anyone tell you what the penalty for robbery was?
A No.
Q Were you ever asked on that date to waive any rights?
A No. **[11]**
Q Did anyone tell you that a plea of nolo contendere was equivalent to a plea of guilty?
A No.
Q Did anyone tell you that by pleading nolo you were giving up your right to a trial?
A No.
Q Did anyone tell you by pleading nolo you were giving up your right to be represented by a lawyer at a trial?
A No.
Q Did anyone tell you that if you had a trial you could present witnesses in your own defense and testify if you wished?
A No.
Q Did anyone tell you by pleading nolo you were waiving all of that?
A No.
Q Did anyone tell you you had a right to appeal a conviction after trial?
A No.
Q Now after you finished that proceeding in the court that day where were you brought?
A Back to the can.
Q When you went back to the -- you say the can, you mean the prison?

A Yeah.
Q When you went back to the prison that day did you see a lawyer?
A No. **[12]**
Q Did you ever see that lawyer again?
A No, I never saw him, no.
Q Do you remember who the lawyer was?
A I don't even know who he looks like if he walked in the courtroom today. If he walked in the courtroom today I wouldn't know what the guy looks like.
Q This was certainly someone that was not retained by you?
A No, I didn't have any money.
Q And did the court appoint a lawyer for you?
A Not that they told me.
Q Now when you returned to the prison you didn't see a lawyer yet?
A No.
Q How about Kandos, did you see him then?
A Yeah.
Q And did you have some discussions with him?
A Yeah.
Q And what were they about?
A He just said that--I said, Bobby, what am I doing over here? What's going on with this case? What am I doing here? What's going on? And I asked him about this nolo thing. He said don't worry about it. It means I don't admit nothing. You're going to go to trial. I got a bigger headache. I got a rape case. But I'm going to get you out of trouble. I got you a lawyer. Don't **[13]** worry about it. I'm waiting and waiting for this lawyer to come and see me.
Q On January 12th of 1959 you were brought back to the Superior Court, is that right?
A Right.
Q And was it the same judge that you had seen on December 12th?

A Yes.
Q On that occasion was the lawyer present?
A I can't tell you because I don't what the guy looked like, you know. I don't know. There was a couple of guys standing next to me but nobody said I'm your lawyer, you know.
Q All right. Were you told on that date that you weren't going to have a trial?
A No.
Q Were you told anything about rights you were waiving?
A No.
Q Were you told anything about the penalty for robbery?
A No.
Q Were you asked any questions at all?
A None.
Q What actually occurred on January 12th?
A The clerk said again Your Honor this is nolo plea contendere. The judge said okay nolo contendere. I **[14]** sentence you six years ACI and that's it. I turned around and --
Q Before the judge pronounced sentence were you given any opportunity to speak on your behalf?
A No.
Q Were the facts explained to you that day?
A Nothing.
Q After you got the six years where did you go?
A Back to the can.

MR. CICILLINE: That's all I have.

THE COURT: Mr. Fowler, questions?

MR. FOWLER: Yes.

CROSS-EXAMINATION BY MR. FOWLER:

Q Mr. Ouimette, you said at the time that you took this plea you only had a seventh grade education, is the correct?
A About that.
Q So you never graduated from high school?

A No. I took the GED about 1970. Maybe '75, '74. I'm not sure. Around there.
Q And did you get your GED?
A Yeah.
Q In fact not only did you get your GED, you took some college courses, didn't you?
A No, I was tutored. **[15]**
Q You were tutored?
A Yes.
Q You didn't take any college courses?
A Not that I can remember.
Q Back in September--on September 15th of 1976 when you were before Justice Needham in Providence Superior Court do you recall being asked, Mr. Ouimette, How far did you go in school and you replied I took a few college courses, do you remember that?
A I remember I was tutored by college students. But if you call that a course, you know, that's what I meant. I took the SAT just prior to that, too. I was looking to go to college actually.
Q You stated that you had been in juvenile court a few times, isn't that correct?
A Yeah.
Q When you went into the juvenile court do you recall having some kind of exchange with the judge before they did anything with you?
A Well, actually when you got to juvenile when you--this is in the '50's now. The only times I can remember when I went in front of the judge, which he was a judge, you sat at a table like this. There was a couple of people there and they said well, you know, we got to send you back to the training school. That was it, you know. **[16]** You had no rights. You had nothing. I had no lawyer. So I mean when I got arrested in '58 I figured this is like the juveniles. You go in. You get accused of something and they put you in the can.

Q And you testified, did you not, that before October of 1958 when you appeared in Superior Court on the robbery charge you had never been to court before?
A I don't believe I was ever in Superior Court.
Q Were you in District Court?
A I think I had a couple of--I had a fight or two.
Q Do you recall when you were arrested on the robbery charge what the date was?
A Not really, no.
Q Do you recall being put in prison on October 22nd of 1958?
A Yeah.
Q Was that with respect to the robbery charge?
A Yeah.
Q And Mr. Kandos was also charged with that robbery, isn't that correct?
A Right.
Q On August 1st of 1958 almost three months before being arrested for this robbery do you remember being in Sixth Division District Court charged with a simple assault by the Providence police? **[17]**
A I remember being in a restaurant one night and some guy come in and bumped me and I hit him a punch and he hit his head in the juke box. I think that's the case you're talking about.
Q So my question to you do you remember being in court for that charge?
A I remember just getting arraigned.
Q Do you recall pleading to that charge and receiving thirty days to serve?
A Not really, no. I think I did get thirty days for it.
Q You don't recall pleading to it in court?
A No. What was the date, sir?
Q On August 1st of 1958?
A What date was the plea?
Q August 1st of 1958.
A I pleaded the same day I got arrested--that I got arraigned.

Q Is that air to say you plead the same day?
A It might have been. I remember being in court for the assault.
Q At about three and a half weeks later on August 30th do you recall being back in court in Sixth Division District Court on a Providence police charge of a misdemeanor larceny and pleading to that charge for a **[18]** thirty day concurrent sentence?
A That's possible, yeah.
Q Do you recall that today?
A Yeah, I say that I remember going to the lower court, yeah.
Q Were you represented by a lawyer in either of those cases?
A I don't think so.
Q Do you recall being represented by the Public Defender?
A Possibly, but I don't remember.
Q Do you recall discussing those cases with an attorney before you pled to them?
A I'm trying to think. I don't think I had a lawyer.
Q So you're telling us today that you have no recollection of having a lawyer?
A No, I just don't remember having a lawyer. I remember being there.
Q Do you remember being there? You remember pleading to those cases? You're not disputing that?
A Yeah.
Q Mr. Ouimette, since October of 1958 you have been in Providence Superior Court a number of times, haven't you?
A Yes.
Q You entered pleas of nolo contendere to a number of **[19]** different cases, haven't you?
A I pleaded to the possession of burglary tools. I had a master key. Somebody developed it trying to sell to the Russian people and I pleaded again with

Jack on a gun case for assault. They were guilty pleas. I don't know if they were nolo pleas.

Q You have also been to Providence Superior Court for trials on certain cases, haven't you?

A Yes.

Q In fact you have been convicted in Providence Superior Court before, haven't you?

A Twice, yeah.

Q Do you recall being before the Providence Superior Court in July of 1965 and receiving a sentence of fifteen months at ACI suspended?

A Um-hum.

Q With three years probation for possession of burglary tools?

A That was the master key I told you about it, yeah.

Q Is that fair to say that was the master key that they had found on you that fit George's T.V. store on Eddy Street? Do you recall that?

A Well, the cops said I kicked the window in or something. Either I was going through the front door or I was going to kick the window in. **[20]**

Q We're talking about the same case?

A Jack said they considered a master key a burglary tool so I had to plead to it.

Q So on August 31st of 1965 do you recall having that fifteen months suspended sentence revoked and being sent to the ACI for fifteen months based on a Warwick Police Department report that you were involved in an incident with Ronald Sweet at the rear of the Gordon Junior High School in Warwick?

A Yeah.

Q Isn't it also true the substantive charge was dropped? That case was later dismissed?

A Right.

Q On January 17th of 1968 do you recall being charged with possession of a firearm while you were in a private club in Providence and arrested by Detective Vincent Vespia?

A Honest Vinny.
Q Do you recall that?
A They bargained with Corrine Grande. He lied so much. Let me explain one thing about that case if I can.

THE COURT: Go right ahead.

A I went on a motion for illegal entry with Mr. Vinny Vespia. I want to tell you his testimony was all in contempt. He said that he walked in the door and Mr. Anthony Caruso was cleaning the gun. He pushed the **[21]** gun to me and I pushed it out of the way. That was the hearing. During the trial a year later Mr. Vespia said when he walked in the door Mr. Caruso was cleaning the gun. I took the gun off Mr. Caruso turned around and pointed at him and threw it over my shoulder. That's how I got found guilty if you want to talk about the case. That's all on record.
Q In spite of that isn't it fair to say on May 28th of 1958 you were found guilty after trial to the charge of possession of a firearm after having a prior conviction of a crime of violence and--
A 1958?
Q And you were sentenced to five years at the ACI, isn't that correct?
A Right. And the robbery case prevented me from testifying in my own defense because I had the robbery case in 1958.
Q On July 14th of 1969 isn't it also true that you were found guilty after trial on a Providence charge of assault on a uniformed police officer and you received a three year suspended sentence with three years probation?
A Another honest guy who was indicted five years later for fourteen breaking and entries. If the jury would have known his character then you think they would have found **[22]** me guilty of assault when he hit me in the head with a blackjack. Come on.

Q Is that a yeah?
A The same cop that said I assaulted him hit me in the head with a blackjack and then years later got indicted for fourteen breaking and enterings and got off the force. Indicted and charged.
Q Mr. Ouimette, do you remember my question?
A Yes, sir.
Q My question to you is you were found guilty after trial and sentenced to three years suspended, three years probation?
A Absolutely.
Q On June 4th of 1971 did you plead nolo to possession of a firearm and received two years at the ACI?
A The guns were in my house. I had a bullet in my foot. I had people trying to kill me, sir.
Q You were found to be in possession of a .45 caliber pistol, isn't that correct?
A Yeah.
Q On March 16th of 1973 do you recall pleading to the charge of failure to stop for a police officer in Washington County Superior Court and receiving a sentence of a fifty dollar fine and court costs?
A Yeah. **[23]**
Q On July 10th of 1972 do you recall being sentenced to ten years at the ACI consecutive to the sentence you were already serving for conspiracy to commit murder?
A Right.
Q Isn't it also true that you later filed a motion through counsel to reduce that sentence?
A Yes.
Q That sentence was reduced from ten years to serve consecutive to ten years to serve concurrent, isn't that true?
A Because you know why? Can I explain that, sir.
THE COURT: Yes.
A Mr. Billy Miller had forty years and he stuck up a bank. He got forty years in the Federal

penitentiary. They made a deal with him to take four years to take the forty years away and give him four years to do on some air force base. Six months after the trial was over we found Mr. Miller's wife. She testified that he was hiding in an alley way when somebody got shot. His wife later said that he was an out-and-out liar to the police. Told her to leave town. This is all on record. And that she was home with him the whole month that she testified he was hiding in an alley way. That substantiated his testimony and they found him not guilty on murder so another good case they had against **[24]** me.

Q Mr. Ouimette, isn't it also true on June 4th of 1971 you pled nolo contendere to a charge of assault on a correctional officer and you were sentenced to one year at the ACI consecutive to the sentence you were already serving?

A That was all one thing put together I believe.

Q Is it fair to say that was the sentence you received on that?

A Yes.

Q On September 15th of 1976 isn't it also correct that you plead nolo contendere on a charge of assault with a dangerous weapon and conspiracy to assault with a dangerous weapon and received a sentence of three years suspended and four years probation on each count concurrent?

A Yes.

MR. FOWLER: May I have one moment please Your Honor.

THE COURT: Yes.

Q Mr. Ouimette, isn't it also true that on February 11th of 1984 you were found guilty of receiving a firearm that had been transported in interstate commerce after having a prior conviction of a crime punishable by more than one year in jail, that being in the Federal **[25]** District Court for

the District of Rhode Island, and you received a sentence of nine years, is that correct?

A No. I received a sentence of eighteen years.

Q There were two counts, isn't that correct?

A Count 1 nine years, Count 2 nine years consecutive.

Q Isn't it also true that on February 1st of 1996 the Federal District Court sentenced you to life without parole based upon a conviction for conspiracy to collect extensions of credit by extortion and actual collections of credit by extortion and aiding and abetting?

A Right.

Q That's correct?

A Yeah.

Q Mr. Ouimette, you also stated that just minutes ago that during the time of this robbery case in Providence Superior Court in 1958 not only were you never advised of the rights that you were giving up or the rights that you in fact had but there were never any discussions about the facts of the case. Is that what your testimony is here today?

A I never saw a lawyer.

Q You appeared in court on more than one occasion for that case, isn't that correct? Three actually?

A Well, three in Superior Court.

Q Mr. Ouimette, you're familiar with the workings of the **[26]** Providence Superior Court to some extent, aren't you, with respect to criminal charges and appeals?

A You know, the worse thing I ever did I got thirty-four years in the penitentiary. In the last thirty-two years I never picked up a law book. You know, you always count on your lawyer. You know what I mean. You say, well, my lawyer is going to take care of it. But your lawyer is not God, you know. You know, they only have enough time in a day.

Q Is that a no?

A As far as the mechanisms of the courthouse?
Q Yes.
A I mean, what do I know? What is there to know? I mean I never went to law school. How do you find out? Is the clerk got time enough to tell you, you know? Now I imagine the laws are different. The judge explains things to you. You have to sign an agreement. In 1958 it was like makeup George. I don't know where you were, sir, but you know it was like a Lassen. Bring them in and that's it.
Q Mr. Ouimette, with respect to my question, today as you stand here you are fairly familiar with the workings of the court, are you not?

MR. CICILLINE: I object to this fairly familiar.

THE COURT: Overruled. You can answer the **[27]** question.

A In what sense?
Q You have been before the Superior Court more than a dozen times, haven't you?
A I haven't been in this courtroom in this court house in the last twenty-five years.
Q That's not my question, Mr. Ouimette. Did you hear my question? The number of times that you have been in court in the last forty years is over a dozen, is it not?
A I don't know about here but probably over a dozen with postponements and trials, yeah. Probably.
Q And on motions as well, isn't that fair to say?
A Well, you know, like I said, you know, you don't think about motions because those are lawyers things to do, you know. If you paid a lawyer you figure he is going to take care of you. You don't ask questions.
Q And you have paid lawyers in the past, haven't you?
A Absolutely.
Q Can you recall some of those lawyers?
A Please.

Q Can you recall--do you remember some of those lawyers?
A John Sheehan, Jack Cicilline. Mostly Jack. He has been my lawyer since 1956.
Q How about Paul DiMaio, did he ever represent you? **[28]**
A Paul DiMaio, what a mistake that was.
Q How but Richard Egbert?
A Egbert is an excellent lawyer.
Q He represented you as well?
A Yes.
Q In fact he represented you in 1976, didn't he?
A Please.
Q In 1976 he represented you, didn't he?
A No.
Q In 1981?
A '81, what did I get? No. Jack represented me in 1981.
Q Mr. Egbert did represent you at some point, didn't he?
A I didn't meet Egbert until--oh, wait a minute. No, no. '86 was the first time when I went back for a hearing in Connecticut on the motion on the gun case.
Q That was on your motion?
A The Circuit Court in Connecticut sent it down for a hearing because of something that happened. We had a witness that said that the cops kidnapped him. But Egbert didn't handle it. It was Konselor.
Q Mr. Egbert did represent you, correct?
A In '86, year, he represented me in my last case.
Q Stephen Famiglitti also represented you, did he not?
A No, he prosecuted me, but he never represented me.
Q You have been represented by a number of attorneys? **[29]**

A Yeah, but mostly by Jack and John Sheehan. Never by Mr. LaFazia who has been listed as my attorney from 1958. You can see that I never, never let him represent me so I don't even know where he came from.
Q You have been in Federal Court as well on a number of occasions, isn't that fair to say?
A On probably two or three occasions, yeah.
Q When you were in Federal Court you were represented by counsel, were you not?
A Yes.
Q Do you recall being before Federal District Court judges in the past?
A Federal District Court judges?
Q Yes.
A Sure.
Q Have you plead in the Federal District Court in the past?
A. Yeah, once. Assault on an agent. But Jack says that if he thought I was going to assault him then I am guilty of assault so what are you going to do.
Q In addition to that plea you have been convicted in the Federal Court, correct?
A Yeah.
Q After you were convicted or pled in Federal Court before you were sentenced you were presented with a presentence **[30]** report?
A Absolutely. You have to read it and agree to it.
Q You were given that presentence report thirty days before the time of sentencing and you were given ten days to review it and object to any portion of it, isn't that fair to say?
A Well, you know, what do you do? You're found guilty. The guy wants you to read the presentence report. You know, what are you going to get. So most of the time you just say listen here, I will sign it, and that's it, you know.
Q In answer to my question is that a yes?
A What's your question?

Q My question is you are aware of the procedure?
A Right.
Q And you had the opportunity to look at your presentence reports in Federal Court, did you not?
A Right.
Q And in fact on prior occasions when you were presented with those presentence reports they include the details of the arrests and convictions you had in the past, isn't that true?
A Right.
Q And not only did they list arrests and conviction but the listed dates, sentences? **[31]**
A Right.
Q And a summary of the facts, isn't that true?
A Right.
Q And in fact specifically with respect to the 1958 robbery those presentence reports listed a paragraph detailing that you along with your co-defendant robbed the shop owner by name of Mrs. Kirzner at gun point. That an undetermined amount of cash was taken. That Mrs. Kirzner was placed in a storage area in the cellar, and that you later admitted that you were the suspect holding the gun when the incident took place?
A Not true.
Q You don't recall reading that summary of facts?
A I remember reading the presentence report but not that I admitted to anything. As a matter of fact the presentence report says that there were two masked men. That wasn't true either. That wasn't true either.

MR. FOWLER: Your Honor, I have a document entitled District Court of the United States for the District of Rhode Island criminal proceeding number 83-59 addendum to an opinion dated June 24, 1984, I ask it be marked for identification.

THE COURT: The clerk will mark it for identification.

MR. FOWLER: May I approach the witness. **[32]**

THE COURT: You may.

Q Mr. Ouimette --

THE DEFENDANT: Can I get my glasses over there.

Q I'm going to show you a District Court opinion, and that was issued on June 28th of 1984 by Judge Raymond Pettine. On page two Judge Pettine indicates that the presentence report in this case shows the following. I'm going to ask you to take a look at that first indented paragraph. It begins 5-18-58 robbery.

A I see these things were misleading. When my case went for the sentencing Kandos with his lawyer made a deal for his rape case and said that I was the guy with the gun. That's what I was sentenced under those facts. Never did I admit in court or anywhere else that I had anything to do with this case.

MR. FOWLER: Your Honor, I move to have that stricken. I haven't even posed a question yet.

THE COURT: Granted.

Q Mr. Ouimette, my question to you is you just told us that on more than one occasion you had the opportunity to review your presentence reports before you were sentenced in the District Court, isn't that true?

A Yeah, absolutely.

Q And during those times have you ever seen that charge with that paragraph of facts listed? **[33]**

A Actually I didn't. But let me tell you something else. In 1984 --

Q You answered my question. Thank you.

A Can I explain?

THE COURT: Your attorney will have an opportunity to ask you further questions.

MR. FOWLER: Your Honor, I would ask that be admitted as a full exhibit if there is no objection to its authenticity.

MR. CICILLINE: I have no objection.
THE COURT: Full exhibit.
THE CLERK: State's one marked full.

Q Mr. Ouimette, let's forget about January of 1959 for a moment. Let's talk about some of your other convictions in Providence Superior Court. On the occasions later on in your career when have been a Providence Superior Court do you recall taking pleas before Providence Superior Court judges?

A Yeah.

Q And you just stated, did you not, that the procedure now is different, isn't that correct?

A Well, in the last couple of years I started to realize that, you know, you start investigating. I never knew you could attack prior convictions. That's why I never bothered to do anything about what my presentence report **[34]** says.

Q Well, when was it you first realized that the procedure is different now?

A When I starting reading in the last year or two.

Q But in fact you had been to court at least nine times in the cases that I just reviewed with you before the last year when you started reading, isn't that correct?

A Yes.

Q On those occasions when you pled to a case or before you went to trial you were aware of the rights that you had, isn't that true?

A Well, your lawyer usually takes care of all that so when you're going to plead guilty he says well, I'm going to go in there and plead you guilty, and that's it. Here's what we are going to do, and so there is not much. You don't have to be a rocket scientist. You have a lawyer that's going to do all the work for you. That's what he's paid for.

Q Is it your testimony today that in the last twenty or so years Mr. Cicilline has never told you your rights when you came to court either to be involved in a trial or to take a plea?

A Oh, yeah. He told me we can go to trial or we cannot go to trial. If you go to trial here's what they are going to prove. Here's what they are going to put against you **[35]** so we make a decision.

Q You have never been dissatisfied with Mr. Cicilline?

A Never. He is not only my lawyer, he is my friend. He has always been honest with me.

Q You always felt he advised you of everything you needed to know before you made a decision?

A Absolutely.

Q Mr. Ouimette, in February of 1994 after you were convicted by a jury for receiving the firearm that had been transported into interstate commerce after a prior conviction, isn't it true that the Government moved to have you sentenced under the dangerous special offender statute?

A That's true.

Q You were quite aware they were attempting to do that?

A And they used that robbery charge again for that.

Q They used that robbery charge?

A For everything.

Q As part of their reasoning, isn't that correct?

A Yeah, they destroyed me. That robbery charge was the worst thing that ever happened to me in my life, and I was stone innocent of it, sir.

MR. FOWLER: I just ask the answer be stricken, the last portion.

THE COURT: I will allow it to stand. Go ahead. **[36]**

Q And at the time that the Government attempted to have you sentenced under the dangerous special offender statute you through your attorney objected to that, didn't you?

A Yeah, but not enough. I wish I would have known a little about the law then that I know now.

Q You know enough about the law to know that at that time that you were denied and the Government won and you were sentenced?

A I am the only man in the country--I am going to answer that--that is sentenced for one course of conduct twice. No one else in the country is sentenced this way. I am the only guy in the country--went to the United States Supreme Court--that got nine years for possession and nine years of possession with erased numbers. You can only possess a gun once. The Eighth Circuit Court of Appeals just come down with a decision, the **Blockburger** decision. I'm going to give him that case which says the Federal District Court was wrong. I am the only guy in the country sentenced that way.

Q So you remember that one very well?

A I have to live with these things. I mean I've been crippled in the last few years.

Q My question is you remember that one very well, don't you? **[37]**

A The two nine year sentences?

Q The sentencing enhancement?

A Of course.

Q In fact when that occurred Judge Pettine issued a written opinion, the addendum to which has been moved into evidence, do you recall that happening?

A I told you I used Mr. DiMaio once and never again, and it was a mistake.

Q My question to you is when that happened Judge Pettine issued a written opinion. Did you ever look at it?

A I never got it. I fired Paul DiMaio right after the trial and hired Bill Konselor.

Q So you're aware that, according to your testimony, you're the only person who has ever had his sentence enhanced in that fashion?

A One course of conduct. The way I was sentenced I am the only guy in the country sentenced that way up until the Federal guidelines come into effect. Now I don't know but we researched it. When I went to the can I sat down with a jail house lawyer and he said there are seven circuits in my favor that said they couldn't do it and two circuits said they could, the First Circuit and the Second Circuit.

Q During the course of your research didn't you also find that a criminal conviction could be shown to be invalid **[38]** if for example a defendant was not afforded a lawyer at the time of the proceeding?

A Well, no, because I wasn't looking in that direction and never thought that. After the sentence was over I figured it was over with. The damage is done and let me move on with my life. I didn't start really trying to find out about the laws until the last couple of years because in the penitentiary now everybody is into dealing with laws because they got so much time they got to go to the law library.

Q Incidentally, Mr. Ouimette, today here in the Providence Superior Court this is the first time you ever suggested to any court that your pleas in 1959 was not a knowing and voluntary plea?

MR. CICILLINE: Objection.

THE COURT: Overruled.

MR. CICILLINE: Judge --

A Yeah, it's clear I got the case filed long before today.

THE COURT: You want to rephrase the question.

MR. FOWLER: I will rephrase the question.

Q The motion that you filed with respect to the hearing, the reason why you are here today, that motion is the first time in the last forty years --

A Absolutely.

Q That you ever brought to the attention of the Court that **[39]** your plea was not a knowing, voluntary plea, isn't that correct?

A Absolutely. Because I told you I never realized that there was anything that could be done about it.

Q In 1984 you filed a motion--strike that.

MR. FOWLER: May I have just one moment, please, Your Honor.

THE COURT: Yes.

Q Mr. Ouimette, we just spoke about your being in court in the Federal District Court for the District of Rhode Island in 1984 and being sentenced as a dangerous special offender. While that sentencing was pending or you had been sentenced, I'm not sure which, isn't it correct that you filed a motion in the State court challenging your good time credits that were owed to you at the ACI in the State system?

A Yeah.

Q By alleging that your release date from State prison was later than it should have been on your ten year sentence?

A Yeah, right.

Q And in fact you took that case all the way to the Rhode Island Supreme Court, didn't you?

A I had Konselor on that case, yeah.

Q So you were represented then as well? **[40]**

A I was a big boy then, Mr. Fowler. No disrespect. I had to grow up in a hurry.

Q And as I said before you took that case to the Rhode Island Supreme Court. In fact it was a reported decision, isn't that true, you were denied?

A I got out and then I would imagine the case became moot. That's what Konselor told me.

Q Let me just --

A I think that's what happened.

Q You recall that motion to get your good time credit?

A Yeah, sure. The judge sentenced me concurrent. He first of all sentenced me consecutive. Then he sentenced me concurrent. Concurrent meant concurrent with the eight year sentence that you're now serving so my argument was that concurrent meant together. He didn't say concurrent from this day. He said concurrent so my good time should have added time, six and a half years. They held me almost nine years. So that was where my beef was.

Q You filed that motion after you got out of prison in fact?

A I filed that--are you kidding. I filed that in '76. That's when I got Konselor actually when this '76 case happened, if I can explain it. I really didn't want to plead to this '76 case because I did nothing wrong. And **[41]** when I got in a little argument with Needham I said, well, let me get another lawyer. So I had DiBiase and I eventually hired Konselor then the prosecutor called me to testify as a witness, State witness, which was a sneak attack. I testified. Then he gave me eight perjury charges for testifying because I took the plea that I didn't want to take in front of Needham so now I am stuck with Konselor who I paid to get my motion for new trial on the conspiracy case. Now he's got to go in and represent me on the eight perjury charges and I got to go back in front of Needham who I got to be good to him because if I ain't this guy ain't going to let me off the hook between the eight perjuries. I got stuck between a rock and a hard place. Needham dismissed eight perjury charges, and I just forgot about it.

Q Your motion for good time credit was denied, wasn't it?

A Like I said it became moot. I don't know. I never got the decision.

Q Well, you filed another motion in Federal?

A I hired lawyers. I didn't do nothing. I don't know what they were doing.

Q Mr. Ouimette, when I said you filed, you filed through your attorney?

A I higher the lawyer. He does the work. Half the time you don't want to look at these things. I don't know **[42]** what legal terms mean. I mean I don't know what to do. Do you look at a dictionary? Do you look at a law book? Just recently in the last year and a half and only because I see a lot of common sense that guys say, Jerry, look, read it. It's just common sense. But prior to that I didn't want to see about the law. I had a hundred things on me happening. I paid lawyers to represent me.

Q Mr. Ouimette, were you aware at the time that your lawyer filed a motion, the same type of motion was filed in Federal Court to try and get your good time credits?

A Which case is this now? I mean I filed motions in '75, '76 to try to get out.

Q After you were released from prison October of 1977?

A I don't know if he did that. Konselor did that. Why would I do it? I'm home.

Q So you're not aware that your attorney filed a motion on your behalf?

A No. He might have did it on his way. Konselor was a strange guy. He had just started coming to Rhode Island and he was bouncing around doing a lot of things in the town. He might have took it on his own to do it.

Q So you're telling this Court that you're not aware of the fact that that motion was filed coincidentally in Federal Court? **[43]**

A Federal time, I know we filed a motion prior to my sentencing as a dangerous special offender because if they were to give me my good time the way they were supposed to give it to me then the

five year period would have ran, and they couldn't have given me dangerous special enhancement.

Q Exactly. That's just my question to you. So you were aware that a motion was filed to try and prevent you from being sentenced?

A Right.

Q As a dangerous special offender?

A Right, yeah.

Q Exactly the same time?

A The decision that came down I never read it because like I said, you know, if a judge gives you a decision he is a judge. He is a brilliant guy. Am I going to start reading things and say the guy is wrong. I don't know. The lawyer says he did. That's it.

MR. CICILLINE: Would you accept that?

THE COURT: Thank you, Mr. Cicilline.

A Just another bad decision you get and you throw it in the box.

Q My point is you were very aware at that time if the Federal Court accepted your lawyer's argument you would have been taken out of the Federal statute definition of **[44]** a dangerous special offender?

A Let me explain something. Paul DiMaio --

Q Please just answer my question first.

A If the judge agreed with my good time, yeah, I would have--they would have taken me out.

Q It would have taken you out of the definition of special offender?

A Absolutely.

Q So you have experience?

A No. You're misleading this court.

Q Please let me finish my question. You have experience through the attorney--through the attorneys that you hired of filing motions in order to escape Federal enhancements in sentencing?

A I had the experience of his analogy. That's all we get. The lawyer says to me listen here, here's what

we are going to do. Fine. If it doesn't work out five months later, a year later, what are you going to do. You don't know the intricacies of what's going on. I never picked up a legal piece of paper in my life. I figured if the lawyer can't do it, shame on me.

MR. FOWLER: One moment, please, Your Honor.

THE COURT: Yes.

Q Mr. Ouimette, on February 1st of 1996 was the last time you were sentenced in Federal Court, isn't that correct? **[45]**

A February what?

Q February 1st of 1996?

A 1996, yeah.

Q That's the last time you were sentenced in Federal Court?

A Yeah, I think so.

Q Correct?

A 1996, yeah.

Q And during that procedure that presentence report was used?

A And I didn't read that either. I mean actually I'm glad you bring this up because this is on record, too. I was supposed to have a four hour sentencing hearing. The trial was so bad the Government was so treacherous I said, Richard, sit down and keep your mouth shut. The judge looked at us three times. Ten minutes went by. I said I guess there's no secrets. Why stand up. I knew I was going to get a life sentence. What's the sense of reading anything. Stand up, Mr. Ouimette, and I got a life sentence.

Q Mr. Ouimette, the --

A No disrespect, Your Honor.

Q Mr. Ouimette, in September of 1976 when you entered the pleas before Judge Needham on the assault with a dangerous weapon and the conspiracy charge do you recall **[46]** that?

A Yes.
Q That was with respect to the incident at the ACI?
A Absolutely.
Q Pasco Meo was the alleged victim--was a victim, isn't that correct?
A Right.
Q Isn't it true that after you received the three year suspended sentence with four years probation on September 15, 1976, in February of 1981 you appeared in court to argue or be heard on a motion for post-conviction relief, do you recall that?
A You know, I didn't even know Jack filed a motion to withdraw the plea until he came and see me about a year ago. But I know, year, we were looking to withdraw the plea.
Q Do you recall being in court for that?
A Well, I had some other problems at the time so I mean we were in court a couple of times, but I don't know which time in front of which judge.

MR. FOWLER: I have a one-page document entitled post-conviction relief I ask be marked State's two as a full exhibit if there is no objection.

MR. CICILLINE: No objection.

THE COURT: Full exhibit. **[47]**

MR. FOWLER: May I have one moment again, please, Your Honor.

THE COURT: Yes.

MR. FOWLER: I don't have any other questions. Thank you, Your Honor.

THE COURT: Thank you. Redirect.

REDIRECT EXAMINATION BY MR. CICILLINE:

Q Mr. Ouimette, you were asked some questions about some pleas in District Court in 1968?
A '58.
Q I'm sorry, 1958. Larceny and simple assault. Do you remember being asked that and acknowledging that you had those convictions?
A Yeah.

Q Do you remember standing before any judge and saying I plead nolo?
A No.
Q Do you know where the nolo conviction which is entered on your records comes from?
A I don't know what you mean.
Q Do you know how the words nolo got on your file for the summer of 1958?
A Probably because of a guilty plea.
Q Do you have any recollection going back to that summer of 1958 what would happen in District Court when you **[48]** went in and entered a plea to some case?
A You go in. See the clerk. And said okay. Listen, pay a fine, and that's it. That's it. You go in front of the judge. He gives you the fine, and that's it.
Q Okay. Did you ever utter the words nolo or nolo contendere yourself prior to October 28th of 1958?
A No.
Q Now, later on in 1969, 1970, 1971 and 1976, you entered pleas of nolo, is that right?
A Right.
Q And by that time the use of the plea affidavit was in place, is that right?
A Right.
Q And lawyers in those days went through the rights form with you?
A Right.
Q And gave you an opportunity to read it?
A Right.
Q But prior to 1969 none of that ever happened, did it?
A No.
Q Now, with reference to this report which indicates Ouimette admitted I was the suspect holding the gun, did you ever tell a probation officer that?
A No.
Q Did you ever tell a policeman that? **[49]**
A No.

Q How did that get in this report?
A Because that was part of the --
MR. FOWLER: Objection.
THE COURT: Overruled.
A That was part of the deal that Kandos made to get himself off the hook for the rape case which I knew nothing about.
Q At the time you and Kandos were arraigned on a robbery charge?
A Yeah.
Q Kandos had a separate case?
A Yeah.
Q And what was he charged with in that case?
A Rape.
Q Okay. And he entered pleas in both those cases, the robbery and his rape case?
A He got six and a half years for it. I find out later on they wanted to give him ten years.
Q Was there ever a time that you looked into the information regarding the robbery of Betsy Kirzner?
A Yeah, of course.
Q When was that?
A A couple of years after I bounced around the can and tried to find out what was going on. I went back. I **[50]** was eighteen. It was devastating to be in the can. I was all alone. But I finally found out that his partner was a kid named Bobby Charpeneau who he was protecting at the time, and Bobby Charpeneau incidentally was one of the guys that was arrested that night. He is the one that hooked up with Kandos to put me in the middle of this robbery.
Q Now, when was it that you first realized that you could undo an invalid plea?
A Actually about a year and a half, two years ago. What got me stimulated was this **Singleton** decision. Everybody in the can was stimulated by the **Singleton** decision and then everybody

starting going to the library. Then I started to talk to guys and, you know, then you start realizing that there are some things that can be done. That's when I got in touch with you and I said, Jack, you know, first of all I never had a lawyer. Second of all I never robbed the joint so then we started to communicate.

Q Had you been visiting the library at any prison prior to the decision of **Singleton**?

A I went once in 1986 or '87--in '86 I think it was--I was in the southern joint for six months. I had met a guy from New York. He said, you know, this case you got, it should be reversed because there is no way I could see **[51]** they can sentence you a twenty-year sentence with one gun. He said give me a couple of dollars. I'll research it for you. Once in awhile you got to come to the library, but I wasn't interested in this law stuff. I used to tell him you go do it. Just give me some facts. I gave him some facts. That's about how I really got involved with this law. That's about as far as I went.

Q What year was that?

A '85, '86.

Q Then more recently in the past year and a half?

A Yeah, the last couple of years. Everybody now in the penitentiary is getting more aware of legal things because everybody is getting buried.

Q As a result of your first learning that there was a chance for you to undo your 1958 conviction what is it that you did?

A What?

Q What did you do when you learned there was a change to vacate the 1958 plea?

A I got in touch with you.

Q You got in touch with me. Write, call? How did you go about it?

A I think I called. I wrote to you first and then Johnny went to see you. And then we started communicating back **[52]** and forth.

Q Okay. Prior to that did you ever have any information or knowledge of the fact that undoing a 1958 conviction was a possibility?

A No. Actually if I could have did in '84 it would have saved me nine years now that you look at, but I didn't know in '84 you could attack prior convictions. If you could I wasn't aware because I didn't go to the library.

Q Are you guilty of this robbery of Betsy Kirzner?

A No.

MR. CICILLINE: That's all.

THE COURT: Recross.

MR. FOWLER: I don't have anything else. Thank you, Your Honor.

THE COURT: Okay. The witness will step down.

MR. CICILLINE: Judge, I have no other witnesses. However, I am a little concerned about some of the questions that Mr. Fowler asked as it relates to the practice that was in place in 1958 as to whether or not the defendants were being advised of their rights back then and whether or not the form was in place. I would tell you that in **Bishop against Longlois** the Rhode Island Supreme Court acknowledged that none of this went on in the 1950's and that pleas were taken without giving defendants--without defendants being given their **[53]** rights and it was usually done in connection with a defendant's thought he might get lienency by doing it. The Rhode Island Supreme Court has acknowledged that was the practice that was in place. Since neither Mr. Fowler or I were around practicing in those days it would be extremely difficult to get witnesses to come in and testify to that. I am relying on what the Supreme Court said in that case that was the practice that was in place. **Boykin** was not

decided until 1969. So there would have been no reason why any Superior Court judge would advise a defendant about all these rights before **Boykin** was decided. As a matter of fact **Boykin** is a United States Supreme Court case. **Doyle**, which is a Rhode Island case, was decided in the same year. The practice didn't come in place until **Doyle** was decided and **Boykin**. So if there is a dispute over that I would rest on these motions.

THE COURT: Okay. The applicant rests. Does the State have any evidence for the Court to consider with respect to this application?

MR. FOWLER: No, Your Honor. The State is not going to put any witnesses on. However, with respect to the motion for the application for post-conviction relief as to information number 75-1436, which is the 1976 conviction, Mr. Cicilline just stated to the Court **[54]** that the copy of the transcript that he supplied to the court was attached to the motion itself. I would just like to have an opportunity with Mr. Cicilline just to look at the motion.

THE COURT: Let's revisit that in a minute. But going back to the first application that's contained in PM 98-4646 he has rested. The State has nothing to offer, is that correct?

MR. FOWLER: That's correct, Your Honor. I would just like to be given the opportunity to go through the memorandum and case law to argue.

THE COURT: We will return to that in a moment. The 75-1436, you're offering a transcript only, is that correct?

MR. CICILLINE: Yes, Your Honor.

THE COURT: Okay. Do you have a copy of that so the two of you can confer on that to make sure that there is no objection to the form that's being offered?

MR. CICILLINE: Unfortunately the only one I have is a marked copy.

THE COURT: Okay. Would the two of you approach for a second.

(Bench conference inaudible to reporter)

THE COURT: The transcript is being given to the clerk. That will be marked as petitioner's full exhibit **[55]** with respect to the 75-1436.

MR. CICILLINE: That's correct.

THE COURT: Nothing further in that?

MR. FOWLER: I have something further, Your Honor. With respect to the 75-1436 could I approach once more for a moment with Mr. Cicilline.

THE COURT: You may

(Bench conference inaudible to reporter)

MR. FOWLER: Your Honor, on the record I would like to submit a certified copy of the stenographic record of the hearing before Mr. Justice Needham on miscellaneous petition number 14244 Kent County Superior Court on February 24th and 25th of 1981. Preset at that time was Stephen Famiglietti, Special Assistant Attorney General for the State, and John F. Cicilline for the petitioner. I ask that be marked as a full exhibit.

MR. CICILLINE: Judge, I reserve the right to challenge this. I have no idea what that transcript is about.

THE COURT: I will mark it full. If after your review you feel it should not be considered, I will give you an opportunity to file an appropriate motion.

MR. CICILLINE: Thank you.

THE COURT: Full exhibit. Is there anything **[56]** further the State has with respect to the second matter?

MR. FOWLER: Only just to clarify for the record, Your Honor, and perhaps for ease of bookkeeping I would like to submit --

MR. CICILLINE: That's fine.

MR. FOWLER: A certified copy of the docket record of 1958 docket number 29046 pertaining to Robert Kandos and Gerard Ouimette with respect to the charge of robbery. I believe your Honor has the docket book itself, but this is a certified copy of the entry that pertains to this case and perhaps will be much easier to include this in the record.

THE COURT: State's full exhibit. Anything further, Mr. Fowler?

MR. FOWLER: No, Your Honor. Thank you.

THE COURT: I know that both the applicant and the State wish to provide memoranda.

MR. CICILLINE: That's correct, You Honor.

MR. FOWLER: Yes, please.

THE COURT: Is there any reason why you can't do it simultaneously given the opportunity to reply if necessary?

MR. CICILLINE: No, Your Honor.

MR. FOWLER: That's fine, Your Honor.

THE COURT: How much time do you need to submit a **[57]** memo?

MR. CICILLINE: Two weeks.

MR. FOWLER: That's fine, Your Honor.

MR. CICILLINE: Or earlier.

THE COURT: Let's continue it three weeks for control purposes. Two weeks to submit memos. I will give you a bench decision or advise you of the decision.

MR. CICILLINE: In the interim the defendant would like to return to Pennsylvania.

THE COURT: That will be ordered.

MR. FOWLER: May we approach for one moment.

THE COURT: Yes.

THE COURT: We will be in recess.

****